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NO. 74-963

IN THE

Supreme Court Of The United States

October Term, 1974

FIRST NATIONAL BANK OF FAYETTEVILLE,
FIRST STATE BANK, BANK OF ELKINS,
FIRST NATIONAL BANK OF SPRINGDALE,
McILROY BANK, BANK OF LINCOLN,
FARMERS AND MERCHANTS BANK,
AMERICAN SAVINGS AND LOAN ASSOCIATION,
AND FAYETTEVILLE SAVINGS AND
LOAN ASSOCIATION ..... *Petitioners*

v.

JAMES E. SMITH, COMPTROLLER OF THE
CURRENCY OF THE UNITED STATES, AND
NORTHWEST NATIONAL BANK ..... *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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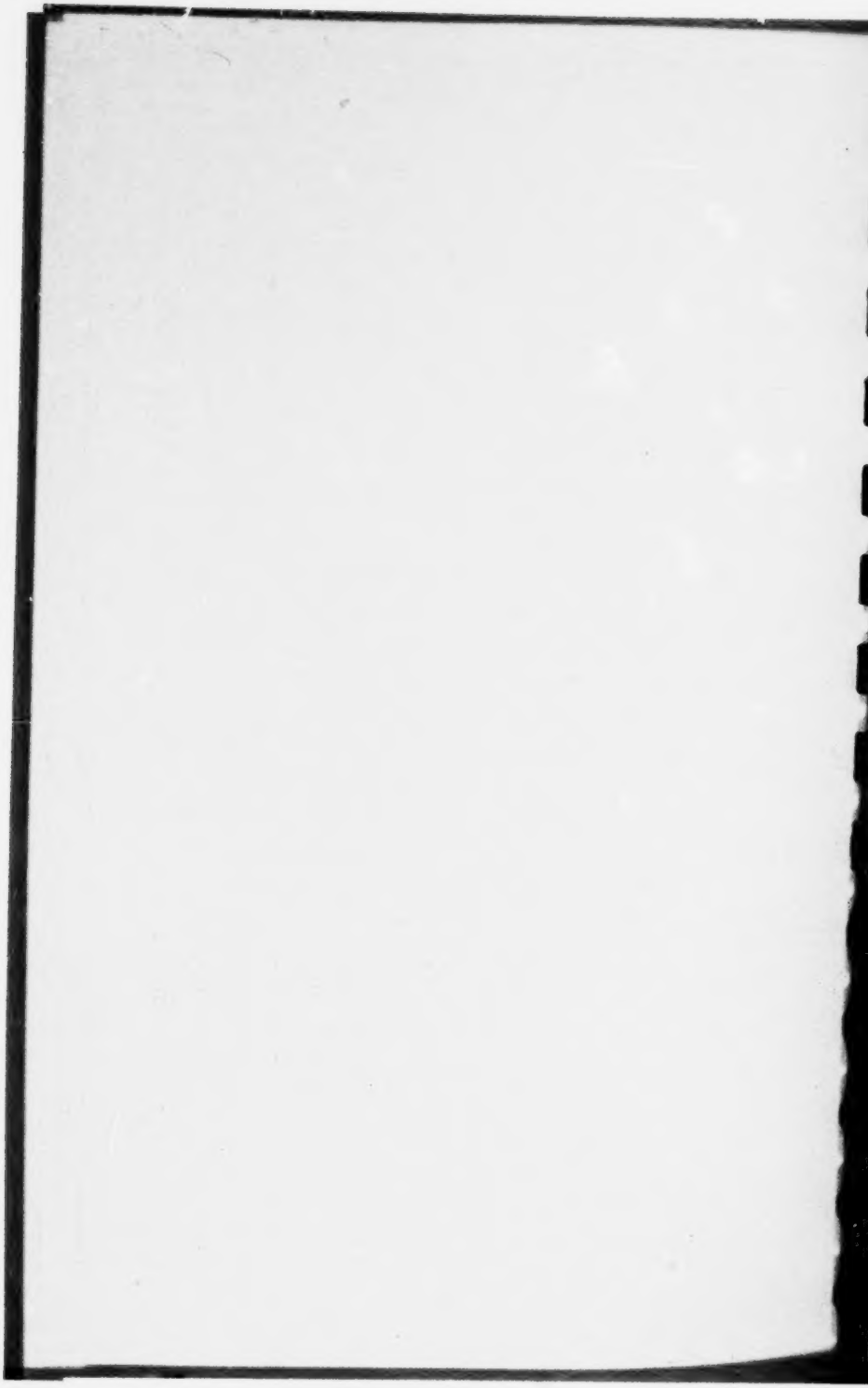

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in the action between the above parties in which petitioners were the appellees and respondents were appellants, the same being Civil Action Nos. 74-1032 and 74-1050.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Arkansas is reported as *First National Bank of Fayetteville v. Smith*, 365 F. Supp. 898 (W.D. Ark. 1973). A copy of the opinion is appended hereto beginning at page 27.

The opinion of the United States Court of Appeals for the Eighth Circuit has not yet been reported. A copy of the opinion is appended hereto beginning at page 57.

A copy of the decision of the Comptroller of the Currency of the United States is appended hereto beginning at page 73.

A copy of the Memorandum of the Deputy Comptroller of the Currency of the United States is appended hereto beginning at page 73.

Copies of the recommendations of the subordinates of the Comptroller of the Currency of the United States are appended hereto beginning at page 76A.

JURISDICTION

The judgment sought to be reviewed was dated and entered by the United States Court of Appeals for the Eighth Circuit on December 31, 1974.

This Court has jurisdiction pursuant to 28 U.S.C., §1254 which provides:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . . ."

QUESTIONS PRESENTED FOR REVIEW

POINT I.

The Comptroller of the Currency of the United States approved an application for a national bank charter in complete contravention of the recommendations of his subordinates. These subordinates included a hearing officer who presided at the public hearing on the application and a field examiner whose investigation included personal interviews with the applicants for the charter and other interested persons in the area affected. Such action by the Comptroller is arbitrary, capricious, an abuse of discretion and not in accordance with law.

POINT II.

In reviewing the judgment of the United States District Court, the United States Court of Appeals ruled that it was bound to give no deference whatever to the District Court decision. Such a rule engenders inefficient judicial determination and induces unnecessary delay into the judicial process.

POINT III.

The Comptroller of the Currency of the United States acted arbitrarily and capriciously in granting the national bank charter under the facts presented.

STATUTES AND REGULATIONS INVOLVED IN THE CASE

The following statutes and regulations are involved in the case:

5 U.S.C. §702; Vol. 1, U.S.C., p. 196 (1970 Ed.):

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

5 U.S.C. §706 in part; Vol. 1, U.S.C., p. 197 (1970 Ed.):

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be —

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

* * *

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. (Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.)"

12 U.S.C. §26; Vol. 3, U.S.C., p. 2263 (1970 Ed.) dealing with the duty of the Comptroller of the Currency to pass on applications for national bank charters is set out at page 71.

12 C.F.R. §4(b), p. 129 (1973 Ed.) dealing with the investigation of a charter application by the Comptroller's office is set out at page 72.

STATEMENT OF THE CASE

This case presents for review a challenge to an approval by the Comptroller of the Currency of the United States of a national bank application. The jurisdiction of the district court was founded upon the existence of a federal question and the requisite amount in controversy, 28 U.S.C. §1331(a). The case is unique in two particulars. First, the Comptroller of the Currency has issued regulations indicating the procedures that his office will follow in reviewing an application for a national bank charter. Those procedures include the gathering of facts by career employees of the Comptroller's office. Such procedure was followed in this case, and the Comptroller solicited and received recommendations from these career employees. However, after such facts had been gathered and the recommendations had been made, the Comptroller reached a decision in complete contravention of that supported by the facts and recommended by the subordinates. His decision relied upon a memorandum written by a deputy comptroller that so perverted the record made by other subordinates as to cause the experienced United States Senior District Judge who heard the case to comment that the memorandum seemed " . . . to indicate a bias on the part of its author." It is this failure of the Comptroller

to properly consider relevant factors which had been gathered and compiled by his own subordinates that is here challenged as arbitrary and capricious action. The second unique feature of the case is the decision of the court of appeals that it should give no deference whatever to the decision of the district court. Even in cases involving a review of administrative proceedings, such a rule cannot be consistent with efficient and effective judicial determination of controversies.

On July 8, 1972, ten individuals filed application with the Comptroller of the Currency of the United States for approval of a national bank to operate in Fayetteville, Arkansas. The applicants filed financial, biographical and economic data in support of their application. A National Bank Examiner conducted an investigation which included personal interviews with the applicants and interviews of other members of the community wherein the bank was to be located. The Comptroller's Regional Administrator held an adversary hearing at which both the applicants and the protestants submitted voluminous evidence in support of each's respective view. The administrative record thus developed was reviewed by the National Bank Examiner, the Regional Administrator, the director of the Comptroller's Bank Organization Division, the senior economist of the Department of Economic Banking and Research, and by a Deputy Comptroller of the Currency. All of the subordinates with the exception of the Deputy Comptroller recommended that the application not be approved. The National Bank Examiner and the Regional Administrator set out the facts upon which their recommendations were made, including facts relevant to the need and convenience of a new bank, and straightforward and critical facts concerning the ability and integrity of the organizers.

The Deputy Comptroller wrote a memorandum in which he quotes out of context relevant statements of the Regional Administrator and in which he contends that the recommendations of the other four subordinates are without support in the record. The Comptroller granted preliminary approval of the application. This action was begun to set aside the Comptroller's decision as arbitrary, capricious and an abuse of discretion.

The United States District Court for the Western District of Arkansas after having reviewed the entire administrative record, determined that the Comptroller had abused his discretion by failing to give consideration to relevant facts which had been gathered by his subordinates. The United States Court of Appeals for the Eighth Circuit held that the District Court recognized the proper rules of controlling law but had failed to apply those rules by substituting its judgment for that of the Comptroller. The Court of Appeals reversed the decision of the District Court and directed the District Court to enter judgment in favor of the Comptroller.

ARGUMENT

In deciding this case, the Court of Appeals decided two important questions of federal administrative law which have not been, but should be, settled by this Court. In addition, the decision of one of the issues in this case calls for an exercise of this Court's power of supervision. As will be demonstrated, the power of supervision is not necessary because of a departure from the usual course of judicial proceedings, but rather because the Court below felt bound by a rule of law which it, impliedly, recognized as causing inefficiency and delay in the judicial process.

POINT I.

IN PASSING UPON AN APPLICATION FOR A NATIONAL BANK CHARTER THE COMPTROLLER OF THE CURRENCY ABUSES HIS DISCRETION BY FAILING TO CONSIDER RELEVANT FACTS GATHERED BY HIS SUBORDINATES.

The parties hereto have been in agreement throughout that a decision by the Comptroller may be overturned by the Courts only if that decision is found to be "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." *Administrative Procedure Act*, 5 U.S.C. §706; *Camp v. Pitts*, 411 U.S. 138 (1973). Neither is it disputed that the Court's review is to be of the entire administrative record already in existence. *Camp v. Pitts, supra*, 411 U.S. at 142. The administrative record in this case is voluminous. As might be expected, it contains a wealth of statistics, data, surveys, projections, and trends concerning population, geography, and economic factors which have been presented by "so-called" experts tending to support the view of each party to the controversy.

Petitioners have purposefully refrained from reciting in detail these volumes of facts for the reason that petitioners would concede that upon such a record, with nothing more, the Comptroller would not have abused his discretion regardless of the decision reached. However, the record in this case contains additional information gathered at the request of the Comptroller by his subordinates. This information, the conclusions drawn therefrom by the subordinates, the memorandum of the Deputy Comptroller which so distorts such information and conclusions as to seemingly indicate a bias, and the Comptroller's failure to consider such relevant information and conclusions form the basis of the petitioner's complaint herein.

The Comptroller of the Currency has assured the Congress that in passing upon applications for national bank charters his office will cause an investigation to be made by a thoroughly competent career professional national bank examiner who commands the respect of his superiors.

The findings of the commissioned national bank examiner with respect to the ability, integrity, and character of the organizers and with respect to the need for a new bank in the proposed service area are set out in the appendix verbatim at page 87. Suffice it to say at this point that the examiner concluded from the facts he found that five of the nine proposed directors could not be recommended to serve in such capacity. He had serious reservations about the ability, integrity, and sincerity of purpose of these individuals. The investigation led him to conclude that the need in the area was for larger and stronger banks and was not for more banks. The Regional Administrator who conducted the hearing on the matter concurred in the findings of the national bank examiner.

The findings of the Regional Administrator are set out verbatim in the appendix beginning at page 76B. In his memorandum, the Deputy Comptroller misquoted these two officers in stating that they found a need for a stronger bank in the area. The Deputy Comptroller's memorandum is set out in full in the appendix beginning at page 73. In 1963, Congress conducted hearings on the discharge of the responsibilities of the Comptroller of the Currency relating to entry into the national banking system. See, *Federal Banking Law Service, Bank Regulation Index*, §386.1A, p. 244.39 (A. S. Pratt & Sons, Inc., 1970 Ed.). At that time, the Comptroller submitted to Congress the procedures used in the investigation and screening of all applications to organize a national bank. The following excerpts are taken verbatim from those procedures which Congress was assured would be followed by the Comptroller:

> "When the Regional Chief National Bank Examiner has been notified that the applicants are ready for the investigation of their proposal, a *commissioned* National Bank Examiner who is a thoroughly competent career professional and who commands the confidence of his superiors is assigned to the case and it is his responsibility to prepare a report of investigation.
>
> * * *
>
> Concurrent with these interviews and sampling of business, professional, competitor and public opinion, the investigating examiner has an opportunity to observe the proposed location of the bank, its accessibility to the public, economic growth, traffic flow, and attractiveness of the surrounding area and location with respect to existing banks. At the con-

clusion of the investigation, *the examiner is in a position to draw rather accurate conclusions* regarding the potential of management, earnings, and deposit forecasts, public need, capital adequacy, location and the general competitive climate in which the new bank would exist. (Emphasis supplied.)

* * *

If the organizers or the proposed active executive management shape up unfavorably as to (1) sincerity of purpose, (2) ability and experience, (3) financial capacity, or (4) character and general standing in the community, the examiner must determine whether it is sufficiently unfavorable to warrant or demand his adverse recommendation on the application, regardless of the nature of his findings on the remaining phases of the investigation." (The entire procedures given Congress by the Comptroller are set out in the appendix hereto beginning at page 77.

After his investigation in this case, the Examiner recommended that the application be disapproved. The reasons for his recommendation were stated concisely as follows:

"Capital sufficient. Directors and management unsatisfactory. No need and bank would not be convenient."

These are the conclusions reached by the individual which Congress was assured was a "thoroughly competent career professional who commands the confidence of his superiors." In this case, these findings were swept aside by the memorandum of the Deputy Comptroller as follows:

"This recommendation is not supported by the record and is a personal judgment without basis in the record."

It was the Congress who invested the Comptroller with his discretionary powers. It is obvious that the Comptroller in this case has failed to live up to the promise which induced Congress to permit him to retain those powers.

As is indicated in the procedures set out hereinabove, the Comptroller assured Congress that an application would be investigated by a National Bank Examiner who has the confidence of his superiors and who is in a position to draw accurate conclusions regarding the application. In this case, the Comptroller relied upon a memorandum of a Deputy which misstated both the conclusion and the facts obtained by the examiner. Petitioners contend that such treatment of the subordinate's activities amounts to arbitrary and capricious action. To demonstrate the manner in which the Deputy Comptroller's memorandum distorted the findings of the subordinate, we quote first from the memorandum and then from those findings. The Deputy's memorandum quotes the examiner as follows:

> "The field investigation report reflects the following comments by the examiner, 'There is a need for stronger commercial banks in the northwest corner of Arkansas . . .'"

The actual findings which were quoted by the Deputy as above appear as follows:

> "It is apparent that there is a need for stronger commercial banks in this northwest corner of Arkansas. Most of the light industrial concerns now obtain their major borrowings from larger institutions. Granted many banks will continue to do so, even with a larger bank with greater lending power, but

many could now benefit from a reasonable capital base in this city. The poultry industry is quite active, but presents a high degree of risk due to its nature. Prices fluctuate greatly and require the strong ability of a larger bank to finance their business.

Although some need exists for more banking outlets in the service area, the public interest would be better served by larger banks and additional convenience branches rather than a new institution."

To further demonstrate the handling of the facts gathered by the subordinates, we quote from the Deputy's memorandum with respect to character and general standing in the community of the applicants, prospective directors, proposed officers, and other employees.

"The directorate as proposed appears to be representative of the business and professional ranks of the community and it is believed they are qualified from a review of the record to provide proper guidance for this new bank.

It should be noted that the examiner does not recommend certain of the organizers as directors; however, this recommendation is not supported by the record and is a personal judgment without basis in the record.

The proposed president appears to be qualified from a review of the record; however it should be noted that the Regional Administrator states 'the proposed president appears to have sufficient experience in banking but not in the areas or functions in which the bank will engage.'

On balance the record does not support the adverse recommendation of the examiner and the Regional Administrator and it is recommended that Mr. Cook be approved as president."

The findings of the commissioned National Bank Examiner with respect to this matter are as follows:

"Even though the proposed bank could be expected to operate at a modest level, its effective contribution to the community would be less than desired. The organizers lack banking experience and the managing officer is only mediocre. The examiner questions the degree of influence exercised by the organizing group in the community. It is also concluded that the proposed directorate has a capacity for some degree of self-serving. While the individual deficiencies of the various organizers are not critical when viewed in isolation, those weaknesses combined, reveal a group of persons lacking sufficient strength, confidence, and ability to properly serve public interest. It is recommended that this application be disapproved."

The Regional Administrator who held the public hearing on the application made the following remarks:

"Of the ten organizers, nine of which are to be directors, only two have had past experience in banking. Furthermore, several of the group have reputations as speculators or are engaged in business enterprises which indicate a high probability of use of the bank for self-dealing purposes. In this connection it will be noted that the organizers will wholly own the real estate holding company affiliate and the bank's blanket bond will be handled by a company owned by organizer Stanton.

The proposed president of the new institution appears to have sufficient experience in banking, but not in the areas or functions in which the bank will engage. Accordingly, he is not recommended for acceptance as the chief executive officer.

The organizing group plans to subscribe to 18,000 45%) of the shares outstanding and the remainder is to be widely distributed throughout the community. It is pertinent to note, however, that the group plans to borrow the entire amount of their respective stock costs from City National Bank, Fort Smith, Arkansas, presumably pledging much of the stock to their loans. Consequently, the lender could be in a practical control of the new bank from a collateral position.

* * *

Although the investigating examiner's public contacts did not reflect any particular enthusiasm for a new bank, this office subsequently received some 80 letters from merchants and others requesting that this proposal be approved. In addition to the fact that the letters were received after the comment provided in 12 C.F.R. 5.4, the public hearing disclosed that at least one of the letters was not authentic.

* * *

With few exceptions, the organizing group is comprised of individuals whose service as directors could be detrimental to the bank or who would provide little business acumen to the board's deliberations . . . ."

The Deputy's memorandum indicates that the above facts are not supported by the record. It should be noted that these are the comments of the examiner who conducted

the field investigation and the Regional Administrator who held the public hearing. They most certainly would be in a better position to judge the record than the Deputy.

In its decision, the Court of Appeals indicated that it was perfectly acceptable for the Comptroller to accept or reject the views of his subordinates as he sees fit. Citing, *First National Bank of Southaven v. Camp*, 333 F. Supp. 682, 686 (N.D. Miss. 1971), *aff'd mem.*, 467 F. 2d 944 (5th Cir. 1972). This may well be a correct statement of the law. However, petitioners respectfully submit, that the Comptroller is at least bound by his assurances to Congress to give due regard to the facts gathered by an investigator who is in a position to draw accurate conclusions. Petitioners submit that by relying upon a memorandum which distorts those facts, the Comptroller has failed to live up to his assurances to the Congress and has acted arbitrarily and capriciously.

POINT II.

THIS COURT SHOULD EXERCISE ITS POWER OF SUPERVISION TO PREVENT INEFFICIENCY AND DELAY IN THE JUDICIAL PROCESS.

In deciding this cause, the District Court recognized the controlling rule as set out by this Court in *Camp v. Pitts, supra,* that it should consider the entire administrative record as a whole. It considered such record and determined that the Comptroller had acted arbitrarily. The United States Court of Appeals held that it too was required to consider the administrative record as a whole in its determination of the case. It further held that it was to give no deference to the decision of the trial court. The Court of Appeals then considered the entire administrative record and held that the Comptroller had not acted arbitrarily. Presumably, the Supreme Court would also review the entire administrative record while giving no weight to the decisions of the courts below. The Court of Appeals apparently recognized the inefficiency and delay inherent in such procedure. It stated:

> "Without engaging in any lengthy commentary on the possible inefficiency and delay engendered by this review procedure, see *Polcover v. Secretary of the Treasury, supra,* we accepted it as controlling."

Polcover v. Secretary of the Treasury, 477 F.2d 1233 (D.C. Cir.), *cert. denied,* 414 U.S. 1001 (1973) presents an excellent example of the problem presented to reviewing courts in these types of administrative law cases. Although that case did not involve a review of a decision of the Comptroller of the Currency, it was relied upon by the Court of Appeals below. *Polcover* was a federal employee discharge case. The United States Court of

Appeals, District of Columbia Circuit held that it was bound to review the administrative record anew, and to give no deference to the opinion of the trial court. A good portion of that Court's opinion deals with the duplicative nature of such judicial review, and expresses its concern with the duplication, delay, expense and despair for the litigant in such a system. Because of that Court's excellent discussion of the problem, we quote from its opinion at length:

> "Duplication, delay, expense and despair for the employee-litigant are inherent in such a system. The interposition of the district court serves, it seems to us, no viable purpose. In the case *sub judice* the petition in the district court was filed by appellant on July 18, 1969, and the order granting appellee's summary judgment motion was entered on October 6, 1971 — a span of nearly 27 months. We wish not to allocate blame for the delay to either of the parties but to the system which fosters it. Such delay would be understandable if meaningful results were produced. Here we find none. The record before us is identical to that before the lower court, and even if a district court opinion were filed this court would not be required to afford it any special notice.
>
> Perhaps one way to avoid the duplication would be to accord some deference to the district court's review of the record and its determinations. A parallel to such action could be drawn to the Supreme Court's occasional usage of a 'hands off' policy regarding courts of appeal's decisions in statutory agency review cases.

* * *

> Our displeasure with the review procedure currently utilized is not of recent vintage, nor is it original with this panel. Circuit Judge McGowan has on at least four previous occasions made footnote references to the problem.
>
> * * *
>
> The chateau of a legislator is not one that we, as members of the judiciary, can or should have stashed away in our wardrobe. We may, however, express concern over matters directly affecting the prompt and efficient dispensation of justice. Finding that Judge McGowan's marginal references of the past have been less than marginally successful in generating study, we have elevated them to the text."

In this case, the Court of Appeals has placed review of the decision of the Comptroller of the Currency in the same undesirable position as was found in *Polcover*. Petitioners respectfully submit that such an important decision with regard to the federal judicial process is one that should be answered by this Court.

In his *Administrative Law Treatise* Professor Davis asks, "Do and should two or three reviewing courts all do the same thing?" His answer is as follows:

> "The theory is laid down by Mr. Justice Frankfurter, speaking for a unanimous Court in the Pittsburgh Steamship case: 'Were we called upon to pass on the Board's conclusions in the first instance or to make an independent review of the review by the Court of Appeals, we might well support the Board's conclusion and reject that of the court below. But Congress has charged the Courts of Appeals and not

> this Court with the normal and primary responsibility for granting or denying enforcement of Labor Board orders. . . . The same considerations that should lead us to leave undisturbed, by denying certiorari, decisions of Courts of Appeals involving solely a fair assessment of a record on the issue of unsubstantiality, ought to lead up to do no more than decide that there was such a fair assessment when the case is here, as this is, on other legal issues." Davis, *Administrative Law*, §29.04, Vol. 4, p. 131.

Petitioners recognize that Mr. Justice Frankfurter was dealing with a National Labor Relations Board case. In those cases, Congress provided that reviews of the Board's decisions should be in the Court of Appeals. The effect of the decision in *N.L.R.B. v. Pittsburgh Steamship Company*, 340 U.S. 498 (1951) was that the Supreme Court when asked to review such a case should merely determine whether the court below had made a fair assessment of the record under proper legal standards.

This Court has held that decisions of the Comptroller of the Currency are reviewable in the United States District Courts pursuant to the provisions of the Administrative Procedure Act. *Camp v. Pitts, supra.* Petitioners respectfully submit that the review of a decision of a district court in such cases should be limited to determining whether the District Court made a fair assessment by use of the proper legal standards. Such a rule was adopted by this Court to avoid unnecessary expense and delay in the judicial process and should be adopted here for those same reasons.

POINT III.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE COMPTROLLER HAD NOT ACTED ARBITRARILY IN GRANTING THE NATIONAL BANK APPLICATION IN THIS CASE.

In ruling that there was support in the record for the Comptroller's decision, the Court of Appeals pointed to specific items of evidence in the record. It is interesting to note that most all of this evidence came from the organizers or from an individual hired by them to substantiate the economic justification for the proposed bank. For example, the evidence relating to population growth, need for a new bank, and that there would be no harm to existing banks all came from the economic professor paid by the organizers to present data supporting the new bank. Testimony concerning continued growth of the University of Arkansas came from one of the organizers. Testimony concerning the excellent proposed site of the new bank was from one of the organizers. Testimony concerning rapid growth of the area came from one of the organizers. The Court of Appeals noted that the record contained both favorable and unfavorable evidence with respect to the character, reputation and banking ability of the applicants and proposed directors, officers and employees of the new bank. Once again, the favorable evidence in the record was presented by these very persons. The unfavorable evidence in the record with regard to character, reputation and banking ability was that evidence compiled by the National Bank Examiner. The court below classified these findings by the Examiner as innuendos. It must be pointed out that the Examiner's findings were based not only on his inter-

views with other persons in the area, but also upon interviews with the organizers themselves. Petitioners can see no rational basis for the Comptroller's elevation of such self-serving declarations over the findings of his own experienced Examiner.

The opinion of the Court of Appeals agrees that the District Court recognized the correct standards of review of the Comptroller's decision. The Court of Appeals, however, reversed the District Court on the basis that the District Court had exceeded those narrow limits of review. The Court of Appeals indicated that the District Court erred by concluding that the proposed capital for the new bank was too small, by giving greater weight to the testimony offered by the expert for the petitioners, and by substituting its judgment for that of the Comptroller. Petitioners earnestly insist that the Court of Appeals is in error in reaching the above conclusions. The District Court recognized that it was its duty to examine the entire administrative record. It did so by way of comparing the facts reflected by such record to the facts claimed to be in existence by the Deputy Comptroller's memorandum. Such comparison was made in regard to each of the five items which the Comptroller's regulations say are to be considered when passing on a national bank application.

With regard to the capital structure, the point made by the District Court was that the Comptroller had approved a comparatively small amount of capital in spite of facts in the record indicating a need for larger banks. With regard to the earning prospects of the new bank, the District Court noted that the memorandum of the Deputy Comptroller made no mention whatever of this

factor. The District Court did believe that the testimony of the protestants was more closely hinged to the actual facts. However, its reasoning was not that the Comptroller had decided the issue incorrectly, but rather that the Comptroller had apparently not considered the issue. With regard to the third factor which the Comptroller's regulations indicate will be investigated, convenience and needs of the community, the District Court was concerned because the memorandum of the Deputy Comptroller had stated that the findings of subordinates of no need were not based upon evidence in the record. Also, the Court was concerned because the Deputy Comptroller's memorandum to some extent distorted the findings of the Examiner and the Regional Administrator. See, 365 Fed. Supp. at pp. 906, 907. In regard to the other factors which the Comptroller's regulations indicate he will consider, the character and ability of the applicants, the District Judge once again did not substitute his judgment for that of the Comptroller, but rather pointed out that the memorandum relied upon by the Comptroller incorrectly stated that the findings of the Examiner were not supported by the record. The District Court's exhaustive review of the record in this regard was not in an effort to show that the Comptroller's decision was wrong, but to show that the record did indeed contain facts which the Deputy's memorandum said it did not.

A careful reading of the opinion of the District Court indicates that it found that the Comptroller did not give consideration to relevant factors after his subordinates had compiled facts in regard to the same. (See, 365 F. Supp. at 901.) This Court has held that an administrative decision which does not consider relevant factors must be returned to the administrative agency for further

consideration. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed. 2d 136 (1971). This is precisely the determination made and the action taken by the District Court in this case. In its opinion, the Court of Appeals does not discuss the failure of the Comptroller to consider these relevant factors. The opinion of the Court of Appeals states that administrative action may be regarded as arbitrary and capricious *only* where it is not supportable on any rational basis. Such a holding is clearly in conflict with this Court's decision in *Citizens to Preserve Overton Park, Inc. v. Volpe, supra*, which indicates that an administrative decision made without considering relevant factors must be remanded to the agency for further consideration.

In its review of the record, the Court of Appeals indicated that the Comptroller was entitled to rely upon the memorandum written by his Deputy. Indeed, the Court of Appeals cited such memorandum as a part of the factual administrative record upon which it relied to find support for the Comptroller's decision. This memorandum was authored by a party who had no opportunity to interview the applicants and other interested persons as did the National Bank Examiner. Its author had no opportunity to see and hear the witnesses testifying at the public hearing as did the Regional Administrator. After his review of the administrative record, the experienced United States Senior District Judge who heard this case in the first instance, found that the memorandum so disregarded facts as to indicate a bias on the part of its author. Petitioners respectfully submit that such a memorandum cannot be deemed to provide a rational basis for the Comptroller's decision.

CONCLUSION

Petitioners respectfully submit that the Court of Appeals erroneously decided two important questions dealing with the administration of justice in the federal courts. Petitioners earnestly contend that the Comptroller of the Currency must be required to abide by his assurances to the Congress relative to procedures to be followed by his office in discharge of his responsibility to pass upon national bank applications, and that the Court of Appeals erred in permitting the Comptroller to ignore basic factual information gathered in the manner which the Comptroller promised the Congress that would be followed. Further, petitioners assert that this Court should take jurisdiction of this cause in order to prevent the unnecessary expense, delay and frustration inherent in a review procedure which has three tiers of courts reviewing the same record without paying any heed whatever to the decision reached by the painstaking labor of each lower court. Finally, petitioners respectfully submit that the Comptroller of the Currency abused his discretion in this case by approving the application for the national bank without first considering relevant facts important to his decision.

Respectfully submitted,

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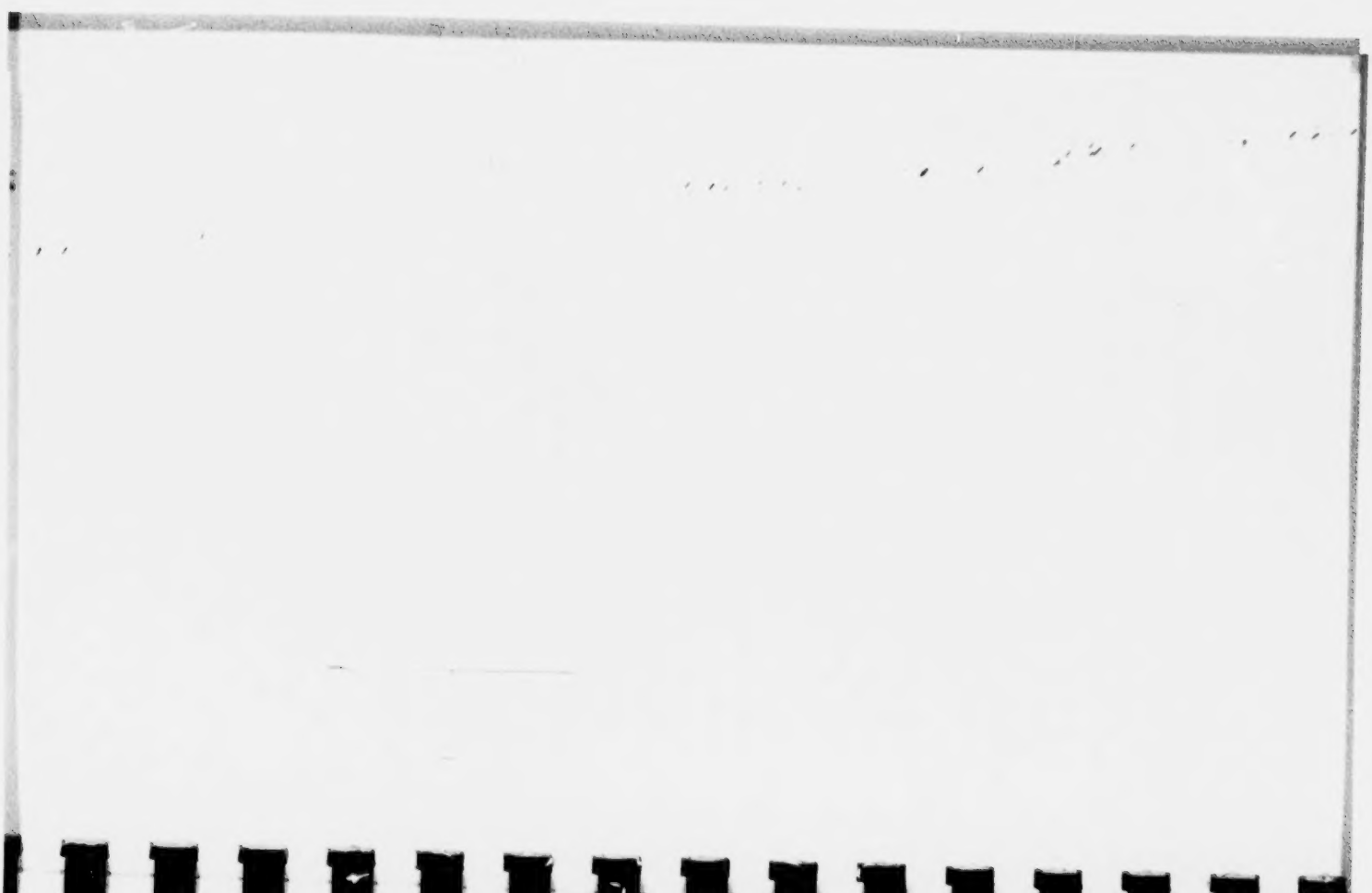

Appendix

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

FIRST NATIONAL BANK OF FAYETTEVILLE, FIRST STATE BANK, BANK OF ELKINS, FIRST NATIONAL BANK OF SPRINGDALE, McILROY BANK, BANK OF LINCOLN, FARMERS AND MERCHANTS BANK, AMERICAN SAVINGS AND LOAN ASSOCIATION, and FAYETTEVILLE SAVINGS AND LOAN ASSOCIATION ..... *Plaintiffs*

v. No. F-73-C-12

JAMES E. SMITH, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES ..... *Defendant*

NORTHWEST NATIONAL BANK ..... *Intervenor*

OPINION

On July 8, 1972, ten individuals, residents of the Fayetteville, Arkansas, area filed application with the Comptroller of the Currency for permission to organize a national bank in Fayetteville. The applications filed financial, biographical and economic data in support of their application. A field investigation was conducted by a commissioned National Bank Examiner, and on November 21, 1972, the Comptroller's Regional Administrator held a hearing on the application in Memphis, Tennessee. The record developed by the investigation at the hearing was reviewed by the Examiner, the Regional Administrator and members of the Comptroller's staff in Wash-

ington, D.C. On February 5, 1973, the Deputy Comptroller, Thomas G. DeShazo, advised the applicants that the Comptroller had granted preliminary approval of the application to organize the Northwest National Bank at Fayetteville.

On February 16, 1973, the plaintiffs, First National Bank of Fayetteville, Arkansas, and one other national bank, together with five banks chartered under the laws of the State of Arkansas and two Savings and Loan Associations chartered under the laws of the State of Arkansas, all residents of the State of Arkansas, and maintaining their principal place of business in Washington County, Arkansas, commenced this action against Thomas B. Camp, the then Comptroller of the Currency of the United States, seeking to enjoin the Comptroller from issuing a charter to the applicants. Soon thereafter Mr. Camp retired and Justin T. Watson became Acting Comptroller.

On March 22, 1973, plaintiffs filed a request for production of documents.

On April 19, 1973, the defendant filed response to the request of plaintiff for production of documents. On July 18, 1973, the plaintiffs filed a motion for an order for sanctions against defendant for failure to make discovery. In the motion it was alleged that in the response of defendant to the request for production of documents, the defendant agreed to file the entire administrative file of his office except for certain personal information filed by the organizers, which the defendant asserted was privileged and not subject to discovery, and that the plaintiffs had constantly sought to obtain the administrative file but defendant had not at that time

submitted and filed any portion of it. Upon the filing of that motion, the court on July 31, 1973, ordered the defendant to furnish to plaintiffs' counsel his administrative file accumulated on the matter herein under consideration, and reserved the question of whether sanctions should be imposed pending defendant's compliance with the order.

On August 28, 1973, the court set for hearing on September 14, 1973, application of plaintiffs for a preliminary injunction pending final determination of this cause, restraining the Comptroller from giving final approval and granting charter authorizing the applicants to operate a proposed facility.

On September 7, 1973, the plaintiffs filed a motion to compel defendant to fully comply with the request for production of documents as set forth in plaintiffs' motion of April 22.

On the date fixed for the hearing on the application for preliminary injunction, the defendant filed his motion for protective order with memorandum in support thereof based upon the affidavit of the Comptroller, in which he stated that the documents not heretofore submitted in the administrative file "may not be made a part of a public court record without significant injury to the Comptroller's office to conduct adequate investigations of national bank charter applications." He further stated that he did not include in the administrative file 52 documents with certain attachments "referring to information solicited and received in confidence from the applicants, commercial reporting services and other individuals with regard to the character, ability and financial affairs of the individual applicants and the proposed management

of the applied-for national bank." Also omitted were ten individual memoranda or portions thereof prepared by national bank examiners concerning the character, ability and financial affairs of each of the applicants for the proposed new bank.

At the conclusion of the hearing on September 14, the court took under consideration the defendant's motion for protective order and the plaintiffs' application for preliminary injunction.

On October 4, 1973, the plaintiffs submitted their memorandum in opposition to the motion of defendant for protective order, and the court on that date entered an order directing the Comptroller to deliver in a sealed package to the Clerk of the Court the documents described in paragraphs 4(a) and (b) of the affidavit of the Comptroller attached to the motion to be inspected in camera by the court only.

On October 12, 1973, the court was advised that applicant would not request the Certificate of Authority from the Comptroller until this case had been disposed of on its merits. Thus, further consideration has not been given by the court to the motion of plaintiffs for a preliminary injunction.

The plaintiffs alleged in their complaint that they "are unable to obtain a meaningful judicial review without the Comptroller making and furnishing findings of fact, conclusions and rendering a well reasoned opinion justifying issuance of a charter on the application, and in the absence of such findings, conclusions and opinion the action of the Comptroller is void and unlawful, and further proceedings by him should be enjoined as any charter issued pursuant to his decisions would be void."

In paragraph 14 of the complaint the plaintiffs alleged:

> "* * * that in the light of the economic data, exhibits and testimony presented to and gathered by Comptroller, that Comptroller acted arbitrarily and capriciously and abused his discretion in approving the issuance of a charter on the application on the basis of such economic data, exhibits and testimony. The proliferation of banking facilities in the Fayetteville area is highly questionable in view of the previous state determination concerning need, convenience and other factors, and because of the unknown and unprovable impact of another banking facility on existing banks and financial institutions so that Comptroller's action is contrary to public interest."

The answer filed by Justin T. Watson while he was Acting Comptroller denied the principal allegations in the complaint, and alleged that the plaintiffs attended the hearing on the application to organize the Northwest National Bank and that they were permitted to submit comments and materials in opposition thereto, and prayed that the complaint of plaintiffs be dismissed.

In the defendant's motion for summary judgment filed September 14, 1973, the Comptroller alleges "that the record now before the court establishes the Comptroller's decision was reasonable and in accordance with the law, that there is no genuine issue of material fact and that defendant therefore is entitled to a judgment as a matter of law."

In support of the motion the Comptroller refers to (1) the complaint, (2) the answer of defendant, and

(3) the certified administrative file on the application dated July 8, 1972.

On October 12, 1973, the plaintiffs filed a cross motion for summary judgment pursuant to Rule 56(b), Fed.R. Civ.P., upon the grounds "that the record now before the court establishes that there is no genuine issue of material fact and that the plaintiffs are entitled to judgment in their favor as a matter of law."

The plaintiffs, in opposing the motion for protective order, contended that the defendant had not made the entire administrative file available to them and that without such information they are effectively denied an opportunity to review a significant and relevant part of the record upon which the defendant's decision is based. They therefore contended that they are entitled to a trial de novo to review the defendant's decision.

The defendant submitted the documents and material in accordance with the order of October 4, and the complete file that was before the Comptroller is now before the court, although not completed in the manner as suggested by the court in *Camp v. Pitts,* (1973) 41 U.S. 138, 36 L.Ed. 2. 106, 93 S.Ct. 1241. The court is of the opinion that the procedure followed in completing the administrative file is valid and cannot agree that plaintiffs are entitled to a de novo hearing. See, *Peoples Bank of Trenton v. Saxon,* (6 Cir. 1967) 373 F. 2d. 185; *First National Bank of Crown Point v. Camp,* N.D. Ind. (1971) 342 F. Supp. 871; *Bank of Dearborn v. Saxon,* (E.D. Mich. 1965) 244 F. Supp. 394.

The court has examined the documents and material in strict accordance with the order of October 4. See,

United States v. Certain Parcels of Land, (S.D. Cal. 1953) 15 F.R.D. 224, 233.

The action arises under Section 10 of the Administrative Procedure Act (5 U.S.C. §§701-17); Sections 21 through 27 of the National Bank Act. (15 U.S.C. §§21-27); and Section 1 of the Declaratory Judgment Act (28 U.S.C. §2201). The court's jurisdiction is founded on the existence of a federal question and the amount in controversy exceeds $10,000, exclusive of interest and costs, 28 U.S.C. 1331(a). *Webster Groves Trust Co. v. Saxon,* (8 Cir. 1966) 370 F. 2d 381; *Olsen v. Camp,* (E.D. Mich. 1969) 328 F. Supp. 728. Under the facts venue is established by 28 U.S.C. §1391.

No one contends that the defendant's action is not subject to judicial review under the Administrative Procedure Act, 5 U.S.C. §701, et seq. *Data Processing Service v. Camp,* (1970) 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed. 2d 184; *Camp v. Pitts, supra.*

In 1966 the Court of Appeals for the Eighth Circuit in *Webster Groves Trust Co. v. Saxon, supra,* at page 384 said:

> "We believe that competing banks, as interested parties, have a right to challenge illegal acts of the Comptroller and that the Comptroller's discretionary actions are not immunized from judicial review * * *."

Beginning on page 387, the court, in discussing the authority and limitations of the Comptroller, said:

> "Therefore, if he acts in excess of his statutory grant of power, acts arbitrarily or capriciously, abuses his discretion, or unlawfully discriminates in violation

of the Constitution, he is certainly subject to restraint by the courts. Though he may exercise the discretion the expertise of his office affords him, the congressional grant of authority does not empower arbitrary and capricious action, nor does it contemplate abuses of that discretion. Therefore, we do not believe the courts are powerless to protect the public from unconstitutional, illegal, or otherwise arbitrary activities of administrative officials. The Comptroller is free to exercise his discretion in the granting of charters, free from any review on the merits of his action. However, if the Comptroller acts in excess or abuse of his legal authority, to this extent his actions are subject to judicial review, with the burden of proof resting on the party seeking the review. This holding we believe to be consistent with §10 of the Administrative Procedure Act. 5 U.S.C. §1009, because no statute precludes judicial review, nor is this the type of agency action that is by law committed to agency discretion so as to be 'immunized from review by the exemption in the preface of §1009.' *First National Bank of Smithfield, North Carolina v. Saxon, supra,* at page 270 of 352 F. 2d. Therefore, subsection 10(c) of the Act, 5 U.S.C. §1009(C) would be applicable. This subsection reads:

"'Acts reviewable.

"'(c) Every agency action made reviewable *and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review.*' (Emphasis added.)"

The above subsection has been incorporated in §704 of 5 U.S.C.

The appropriate standard for review is whether the defendant's action and holding are arbitrary, capricious and an abuse of discretion or otherwise not in accordance with law.

Title 5 U.S.C. §706 provides that the reviewing court shall:

> "(1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> "(2) hold unlawful and set aside agency action, findings, and conclusions found to be —
>
> "(A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;
>
> * * * * *
>
> "In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

The administrative file in its entirety must be considered. *Camp v. Pitts, supra*; *Universal Camera Corp. v. National Labor Relations Board,* (1951) 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456

The burden is upon the plaintiffs to show from the administrative file as a whole that the defendant acted arbitrarily, capriciously, abused his discretion, or otherwise failed to act in accordance with law.

Capricious is defined as lacking a standard or norm, marked by variation or irregularity, lacking a predictable pattern, erratic or whimsical. *Webster's Third New*

International Dictionary. Arbitrary is said to mean not rational or not done or acting according to reason or judgment. *Black's Law Dictionary* (Rev. 4th Ed.). The term taken together, "arbitrary and capricious," has been defined as an act done without adequate determining principle or not done according to reason or judgment. In 73 C.J.S. §209, Public Administrative Bodies and Procedure, p. 569, the learned author states:

> "*Under the rules as* to the scope of judicial review, 'arbitrary or capricious action' of administrative bodies means willful and unreasoning action, without consideration and in disregard of the facts or circumstances of the case, and under the provisions for judicial review of administrative action contained in the Federal Administrative Procedures Act, 5 U.S.C.A. §1001 et seq., the question of 'reasonableness' depends on whether the order sought to be reviewed is a rational conclusion and not so unreasonable as to be capricious, arbitrary, or an abuse of discretion."

In *Citizens to Preserve Overton Park, Inc. v. Volpe,* (1971) 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed. 2d 136, the Supreme Court had occasion to consider the statutory language involved herein, and at page 416 of 401 U.S. said:

> "Section 706(2)(A) requires a finding that the actual choice made is not 'arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.' * * * To make this finding the court must consider whether the decision was based on a consideration of t[illegible] relevant factors and whether there has been a c[illegible]ar error of judgment * * *. Although

this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency."

In 4 *Davis Administrative Law*, §29.03, p. 127, the author states:

> "The only federal problem about review on the whole record is the curiously cluttered one of what was the law before enactment of the APA in 1946. It is hard to see how sensible judges could conceivably appraise the substantiality of evidence in a record without looking at the evidence on both sides, for evidence has significance only in a context, not in the abstract. As Professor Jaffe wrote as long ago as 1943: 'Obviously responsible men would not exercise their judgment on only that part of the evidence that looks in one direction; the rationality or substantiality of a conclusion can only be evaluated in the light of the whole fact situation or so much of it as appears. Evidence which may be logically substantial in isolation may be deprived of much of its character or its claim to credibility when considered with other evidence.' "

Briefs have been served and submitted by the parties in which their contentions and arguments in support thereof have been fully presented.

The intervenor, Northwest National Bank, in its brief adopted by reference certain portions of the Comptroller's supporting memorandum brief of his motion for summary judgment. It contends that the standard of review must be applied in relation to the administrative record as a whole, and that the facts need not sub-

stantially support the decision of the Comptroller but merely provide a rational support thereof. The intervenor then discussed the five investigative areas indicated in 12 C.F.R., §4.2(b), discussed by plaintiffs in their brief. As to the third area of investigation relating to convenience and needs of the community to be served by the proposed bank, the intervenor contends that the answers to those questions are matters of judgment and the point is not whether the Examiner's or Regional Administrator's judgment is supported in the record for the reason that they are charged with the burden of making a decision thereon, and repeats that the sole issue on review is whether there is a rational basis in the record for the Comptroller's decision. A similar contention is made with reference to the fourth and fifth areas of investigation.

All the briefs and arguments of the parties have been considered.

The administrative file discloses that the defendant took the following actions prior to making his decision upon the application.

A field investigation was made by a commissioned National Bank Examiner. A hearing was held by the defendant's Regional Administrator, at which protestants of the application and organizers were permitted to introduce evidence in support of their respective positions and contentions. The subordinates of the defendant were requested to and did make recommendations to the defendant. The National Bank Examiner who conducted the investigation, the Regional Administrator, who conducted the hearing and supervised the compiling of the administrative file, the Director of the Bank Organiza-

tion Division, the Senior Economist of the Department of Economic Banking and Research, and a Deputy Comptroller of the Currency all submitted findings and recommendations on the application. Four of the above listed subordinates recommended that the application be disapproved. Only the Deputy Comptroller of the Currency recommended that the application be granted. The examiner, the Regional Administrator, the Director of the Bank Organization Division and the Economist briefly stated their reasons for disapproval.

The Comptroller, Mr. Camp, gave no reasons whatsoever, merely signed his name as approving the application. He made no findings of fact nor is there any statement of reasons for his decision in the file. He is not required to file an opinion or enter in the file any findings of fact. *Camp v. Pitts, supra*; *Sterling National Bank of Davie v. Camp,* (5 Cir. 1970) 431 F. 2d 514; *Webster Groves Trust Company v. Saxon, supra.* He merely adopted the statement of the Deputy Comptroller and must have accepted and relied upon the conclusions of the Deputy Comptroller (A.F. pp. 9-12) as requiring the approval of the application. Therefore, it is necessary to examine the entire file and compare the reasons given by the Deputy Comptroller with the facts as disclosed by the administrative file to determine whether there is a rational basis in the record for the Comptroller's decision. *Citizens to Preserve Overton Park v. Volpe, supra.*

Sec. 4.2(b) of 12 C.F.R., issued by the Comptroller, governing the action to be taken by his office upon receipt of an application for a national bank charter, provides:

"(b) Investigation. The Comptroller of the Cur-

rency may conduct such investigation as he deems necessary or proper, including the gathering of information as provided in Part 5 of this chapter. Matters investigated include:

"(1) The adequacy of the proposed bank's capital structure.

"(2) The earning prospects of the proposed bank.

"(3) The convenience and needs of the community to be served by the proposed bank.

"(4) The character and general standing in the community of the applicants, prospective directors, proposed officers, and other employees, and other persons connected with the application or to be connected with the proposed bank.

"(5) The banking ability and experience of proposed officers and other employees."

A comparison of the facts reflected by the administrative record with the memorandum of the Deputy Comptroller will be made upon the factors appearing in the above regulation.

(1) In regard to the capital structure of the proposed new bank, the Deputy simply states that the proposed capital of $1,000,000 is considered adequate. (A.F. p. 11). The Regional Administrator comments that this meets statutory requirements and is considered sufficient to support the type of lending operations contemplated as well as to offset initial operating costs until a breakeven point is reached. (A.F. pp. 23, 61). The record reflects that

other banks and savings and loan associations in the area have the following capital structures:

First National Bank, Fayetteville, Ark.	$5,495,291
McIlroy Bank, Fayetteville, Ark.	3,639,539
First National Bank, Springdale, Ark.	3,051,056
First State Bank, Springdale, Ark.	2,382,857
Bank of Elkins, Elkins, Ark.	339,311
First Fed. Sav. & Loan Asso., Fayetteville, Ark.	1,114,837
Fayetteville Sav. & Loan Asso., Fayetteville, Ark.	1,550,959
American Sav. & Loan Asso., Springdale, Ark.	1,502,579

It is readily apparent that each of the competing commercial banks in the immediate area of the proposed new bank except one have a capital structure of at least twice that accepted by the defendant for the proposed bank. This comparatively small amount of capital was approved in spite of undisputed findings in the administrative record that the banking need in the area was for larger banks, not for more banks. (A.F. p. 60).

The administrative record also reflects that the organizers planned to hold 45% of the stock of the new bank, and that the group planned to borrow the entire amount of their respective stock costs from the City National Bank, Fort Smith, Arkansas. (A.F. p. 62). In the letter approving the application, the Deputy Comptroller required that none of the organizers could borrow in excess of 50% of the cost of the stock. (A.F. p. 2). This require-

ment is, of course, in the public interest. However, it is not clear how the requirement will prevent the undesirable result of the lending institution having control of the new bank. Certainly, the lender will still require a pledge of the stock to secure the loan. Further, such a result may well violate the new Arkansas statute of March 5, 1973, relating to branch banking, Section 2(c) of which provides that no Arkansas bank shall establish a branch outside the county in which its main office is located. If the lender bank effectively has control of the new bank through pledged stock, then the new bank may well be a branch of the lender. In any event, control of the new bank by another banking organization is certainly undesirable.

(2) The second factor which may be investigated by the defendant is the earning prospects of the proposed bank. The memorandum of the Deputy Comptroller makes no mention of the earning prospects. (A.F. pp. 10-12). At the public hearing the applicants introduced five witnesses, one of whom was Dr. Gene C. Lynch, and the protestants introduced five witnesses, one of whom was Dr. John E. Kane. Both witnesses expressed opinions relative to the earning prospects of the proposed bank.

Professor Lynch is Associate Professor of Finance at the University of Arkansas, and has taught at various times commercial banking, money and banking, investments, financial institutions, real estate and finance. Presently he is concentrating primariiy on financial institutions and real estate finances. In his study of the Northwest Arkansas territory, and particularly the Fayetteville-Springdale area, he prepared a book or report entitled "Northwest National Bank of Fayetteville, Pro-

posed Economic Justification." His testimony as to the prospects of a proposed bank is based almost entirely upon his opinion of the future growth and needs of the area. He estimated that the City of Fayetteville would have a population of 76,000 by the year 2000, and that Springdale was expected to have a population of over 45,000, or a combined population of 120,000 in the year 2000. Upon this prospect he reached a conclusion that there is need for a new national bank in north Fayetteville. He testified that he thought the bank would be profitable based largely upon his projection of income over a period of years. He said that the bank would lose during its first year, but in the third year he projected it would make a profit of $90,000 based upon projected deposits of 6.3 million.

Dr. Kane has been with the University of Arkansas since 1946 as an Assistant, an Associate Professor, and Professor and has served in various capacities, such as Chairman of the Department of General Business, Chairman of the Department of Economics, and Associate Director of the Bureau of Business and Economic Research. He has taught primarily in accounting, economics and finance. At the present his main courses are in money and banking at the graduate level. He has taught banking management, courses in statistics and other kindred subjects. He has been associated with various banking educational efforts for 14 or 15 years and has been a member of the faculty of the Southwest School of Banking in Dallas and the Assembly of Bank Directors, a national organization. In other words, he has been closely connected in banking management and has encountered practically every problem that arises in the operation of banks. He is a Director of the McIlroy Bank

in Fayetteville, which is one of the chief protestants and a plaintiff. He had studied the application for the establishment of the Northwest National Bank, and outlined fully his reasons for being opposed to the granting of a charter. One of his reasons for objecting to the creation of a new bank is that the area contains an excessive number of banks, and he believes that the present area institutions should be allowed to continue to grow without dilution, on the ground that the need is for greater and stronger banks. He compared the northwest Arkansas area with other areas in Arkansas and is firmly convinced that there is no need for the creation of a new bank.

The testimony of these two witnesses with their exhibits is voluminous. Their opinions are based upon their individual conclusions of the mass statistics. The court is of the opinion that Dr. Kane's testimony is hinged more closely to the actual facts and conditions that exist in the area than the testimony of Dr. Lynch.

Apparently the defendant gave no consideration to this factor in reaching his conclusion as to the need of a new bank in that area. It may be that if the various projections and opinions of Dr. Lynch materialize, there will be a need for another bank in the area in the year 2000, but certainly not at this time.

(3) The third factor that may be investigated according to the regulations issued by the defendant is the convenience and needs of the community to be served by the proposed bank. In this regard the memorandum of the Deputy Comptroller does not truly state the actual findings of the National Bank Examiner who made the field investigation and the Regional Administrator. He

also ignores the recommendations of the Director of the Bank Organization Division and the economist. In his memorandum to the Comptroller he quotes the Examiner as follows:

> "The Field Investigation report reflects the following comments by the Examiner, 'there is a need for stronger commercial banks in the northwest corner of Arkansas * * *.'" (A.F. p. 11).

The record shows that the Examiner and the Regional Administrator stated:

> "It is apparent that there is a need for stronger commercial banks in this northwest corner of Arkansas. Most of the light industrial concerns now obtain their major borrowings from larger institutions. Granted many will continue to do so, even with a larger bank with greater lending power, but many could now benefit from a reasonable capital base in this city. The poultry industry is quite active, but presents a high degree of risk due to its nature. Prices fluctuate greatly and require the strong ability of a larger bank to finance their business.
>
> "The organizers state the present banking services are adequate and that their interest is generally aimed at future growth. They expect that there will be adequate growth to provide excellent opportunity for a third bank in Fayetteville. It is apparent that little consideration has been given to the total market situation as this examiner views it. The area is presently served by two commercial banks and two savings and loan associations in Fayetteville. In addition, two quite competitive commercial banks and one savings and loan association serve the proposed area

greatly from the Springdale area. It would appear that the present need for banking facilities could be more adequately served by branches of the present institutions." (A.F. p. 60).

"Although some need exists for more banking outlets in the area the public interest would be better served by larger banks and additional convenience branches rather than a new institution." (A.F. p. 63).

The Regional Administrator was also of the opinion that the need for other outlets would be adequately fulfilled when the new law concerning branch banking was passed by the Arkansas General Assembly. (A.F. 63). As heretofore stated, the law became effective March 5, 1973. The exact words of the Regional Administrator are:

"In the event the statutory change is made, the existing banks in Fayetteville and Springdale will be in a position not only to furnish better service through present outlets but to establish new branches in growth areas. Thus, any public need for a new bank, per se, would be largely negated."

Thus, the memorandum of the Deputy Comptroller clearly does not accurately represent the findings of the field investigator or of the Regional Administrator who held the public hearing.

The file as now completed contains an abundance of evidence to support the findings of both the Examiner and the Regional Administrator. Even the applicants stated that present banking services are adequate. (A.F. 60). The immediate area of the site of the proposed bank is served by four commercial banks and three savings and loan institutions. (A.F. 19 and 20). There is a need in

the area for larger banks. (A.F. 57). Allowing the new bank to open would dilute the growth of the existing institutions. (A.F. 55). As compared to other similar areas in the state, the Springdale-Fayetteville service area is presently heavily serviced by banks and savings and loan institutions. (A.F. 64). The population per bank in the Fayetteville-Springdale service area is lower than that in any other similar area of the state. (A.F. 72). Deposits per bank in the Fayetteville-Springdale area are also lower than in other comparable areas in the state. (A.F. 77). In terms of convenience to the public, the existing bank facilities would be more convenient to public access for 63% of the primary service area of the new bank than would the proposed new bank. (A.F. 94). Most people interviewed by the examiner indicated that present banks were serving the needs quite adequately. (A.F. 47). Facts in the administrative record tending to indicate that there is no need for a new bank could be recited indefinitely. The Deputy Comptroller not only misinterpreted the findings of the subordinates but is simply incorrect when he states that those findings were not based upon evidence in the record. The report of the Deputy is not in accord with the facts and is capricious and arbitrary. Since the defendant's decision is based upon the recommendation and views of the Deputy, it is clearly arbitrary if not capricious.

The fourth and fifth factors listed by the defendant as permitting consideration are closely related and will be treated jointly herein. The fourth is the character and general standing in the community of the applicants, prospective directors, proposed officers, and other employees, and other persons connected with the application or to be connected with the proposed bank. The banking

ability and experience of the proposed officers and other employees is the fifth factor. In order to show the handling of this matter by the Deputy Comptroller, his reference thereto in his memorandum (A.F. 10) is quoted below in full:

> "The directorate as proposed appears to be representative of the business and professional ranks of the community and it is believed they are qualified from a review of the record to provide proper guidance for this new bank.
>
> "It should be noted that the Examiner does not recommend certain of the organizers as directors; however, this recommendation is not supported by the record and is a personal judgment without basis in the record.
>
> "The proposed president (John S. Cook) appears to be qualified from a review of the record; however, it should be noted that the Regional Administrator states, 'The proposed president appears to have sufficient experience in banking but not in the areas or functions in which the bank will engage.'
>
> "On balance, the record does not support the adverse recommendation of the Examiner and Regional Administrator and it is recommended that Mr. Cook be approved as President."

The above statements that the subordinates' recommendations were not supported by the record are used by the Deputy to attempt to offset some rather critical findings by the subordinates. The findings of the commissioned bank examiner who made the field investigation on the application are as follows:

"Even though the proposed bank could be expected to operate at a modest level, its effective contribution to the community would be less than desired. The organizers lack banking experience and the managing officer is only mediocre. The examiner questions the degree of influence exercised by the organizing group in the community. It is also concluded that the proposed directorate has the capacity for some degree of self-serving. While the individual deficiencies of the various organizers are not critical when viewed in isolation, these weaknesses combined, reveal a group of persons lacking sufficient strength, confidence and ability to properly serve the public interest. It is recommended that this application be disapproved." (A.F. p. 60).

The Regional Administrator who held the hearing on the application made the following findings:

"Of the ten organizers, nine of which are to be directors, only two have had past experience in banking. Furthermore, several of the group have reputations as speculators or are engaged in business enterprises which indicate a high probability of use of the bank for self-dealing purposes. In this connection, it will have been noted that the organizers will wholly own the real estate holding company affiliate and the bank's blanket bond will be handled by a company owned by Organizer Stanton.

"The proposed president of the new institution appears to have sufficient experience in banking, but not in the areas or functions in which the bank will engage. Accordingly, he is not recommended for acceptance as the chief executive officer.

"The organizing group plans to subscribe to 18,000 (45%) of the shares outstanding and the remainder is to be widely distributed throughout the community. It is pertinent to note, however, that the group plans to borrow the entire amount of their respective stock costs from the City National Bank, Fort Smith, Arkansas, presumably pledging much of the stock to their loans. Consequently, the lender could be in practical control of the bank from a collateral position.

* * * * *

"Although the investigating examiner's public contacts did not reflect any particular enthusiasm for a new bank, this office subsequently received some 80 letters from merchants and others requesting that this proposal be approved. In addition to the fact that the letters were received after the comment period provided in 12 C.F.R. 5.4, the public hearing disclosed that at least one of the letters was not authentic. (Refer to pages 124 and 125 of the hearing transcript.) Subsequently, it was disclosed that Organizer Eoff had prepared the letter and signed an associate's name to it which casts doubt on the validity of the remaining communications." (A.F. p. 62).

"With few exceptions, the organizing group is comprised of individuals whose service as directors could be detrimental to the bank or who would provide little business acumen to the Board's deliberations * * *." (A.F. p. 63).

These rather strong statements are simply brushed aside by the Deputy's comment that they are personal judgments not supported by the record. It should be noted

here that the defendant has assured Congress that each application received by him will be investigated by a commissioned bank examiner "who is a thoroughly competent career professional and who commands the confidence of his superiors." *Federal Banking Law Service, Bank Regulation Index* (A. S. Pratt & Sons, Inc., p. 244.40).

To determine whether such findings may be so lightly regarded by the Deputy, further brief reference to the record is emphasized to determine whether the findings were in fact "personal judgments without basis in the record." The portion of the administrative record for which the defendant has claimed a privilege from disclosure deals with the character and ability of the applications, and have now been furnished. An examination of the complete file furnishes ample corroboration and support for the conclusions of the subordinates. Their conclusions are not personal judgments but are based upon the administrative file. Only two of the nine applicants have had any banking experience whatever. (A.F. p. 15). The applicants were unable to generate any public enthusiasm for the new bank. (A.F. p. 62). One applicant owns the insurance agency through which the fidelity bond of the employees of the new bank is to be written. (A.F. p. 62). One applicant owns land adjacent to the proposed site of the new bank. (A.F. p. 59). The organizers paid $2,000 for a market survey and did not report the expenditure as required by the application. (A.F. p. 59). The organizers obtained legal service in protesting a relocation application of one of the plaintiffs and also failed to report this expenditure as required by the application. (A.F. p. 59). The organizers proposed to own the company which would lease the land and building to the new bank. (A.F. p. 59). The organizers proposed to bor-

row the entire amount of their respective investments in the new bank. (A.F. p. 59). One organizer signed the name of an associate to a petition letter. (A.F. p. 62). Several of the persons interviewed by the Examiner expressed concern with the ability and sincerity of some of the organizers. (A.F. pp. 48-49). Several of the organizers have reputations as speculators. (A.F. p. 62). One of the executives of an existing bank disclosed that he had in the past been a next door neighbor to one of the organizers and had serious reservations about his ability and sincerity in supervising a commercial bank. (A.F. p. 48). Not a single one of the local people contacted by the Bank Examiner indicated that he would do business with the new bank. (A.F. p. 47). The experience of the managing officer has been in the field of international banking. (A.F. p. 44). The estimate of the applicants that the operations of the new bank would be profitable within the second year was considered totally unrealistic by the Regional Administrator. (A.F. p. 62). In summary, there is an abundance of facts in the record which supports the findings of the Examiner and Administrator that the applicants were lacking in strength and ability. That part of the administrative record which tends to indicate that the organizers are qualified are some 80 letters referred to by the Regional Administrator received out of time by the Regional Office. Of these letters, 23 are by the organizers, family of the organizers, or business associates of the organizers. Eight of the letters deal with integrity or ability. One of the letters was not authentic in that the purposed signature was placed thereon by one of the organizers. Some of the letters and documents received in camera refer to the qualifications and lack of qualifications, but on the

whole do not dispute the statements made by the Chief Examiner and the Regional Administrator.

The Deputy Comptroller has attempted to avoid the proper findings of the two subordinates and to substitute patently unsupported conclusions in their stead. The defendant has asserted that it is his duty to assure that national banks are "soundly and honestly managed." (Affidavit of Defendant in support of motion for protective order.) A failure to consider facts bearing upon the honesty, integrity and ability of the organizers is surely arbitrary and capricious action.

The defendant in his brief filed herein does not point to any facts in the record which support a conclusion that the organizers are capable of operating a commercial bank properly. Rather, he asserts that the protestants did not challenge the character, integrity or ability of the applicants at the administrative hearing and are thereby prevented from doing so now. This contention is made in the face of the fact that several officers of the plaintiffs indicated to the Examiner that they questioned these characteristics of the organizers. (A.F. pp. 48-49). Even if there had been no protest at all the defendant has the duty to inquire as to character, ability, integrity and honesty of the organizers. 12 C.F.R. §4.2(b). In the opinion of the court the defendant did not give proper consideration to these relevant factors even after his subordinates had compiled facts in regard to the same.

In summary, the administrative record herein indicates that the defendant did indeed act arbitrarily and capriciously. He has apparently relied upon a memorandum of a Deputy which perverts the findings of four subordinates in regard to need. He has not given consider-

ation to the only evidence in the record which reflects upon the character, reputation, and ability of the organizers. To the contrary, he has relied upon a memorandum of a Deputy that so obviously disregards facts in favor of unsupported conclusions that it seems to indicate a bias on the part of its author. A failure to consider relevant factors is arbitrary action. *Citizens to Preserve Overton Park, Inc. v. Volpe, supra.* As recently as August 13, 1973, the United States Court of Appeals for the Eighth Circuit reversed and remanded a decision back to the defendant for the defendant's failure to consider one factor relevant to the decision. See, *Driscoll v. Northwestern National Bank of St. Paul,* (8 Cir. 8/13/73) 484 F. 2d 173 (1973).

The defendant contends that the findings of the Deputy Comptroller, upon which the defendant's decision is based, should not be set aside upon the challenge made by the plaintiffs. A careful reading of the decision in *Camp v. Pitts, supra,* discloses that the Supreme Court did not overturn the decision of the Court of Appeals in that regard. The Court simply ruled that the Appeals Court could not require the de novo hearing by the District Court when there is a finding of an inadequate administrative record. It should be borne in mind that this is an action by plaintiffs in which they are seeking judicial review of the Comptroller's adjudication upon the entire record or administrative file. In such a proceeding the proper standard for a judicial review is whether the Comptroller's adjudication upon the entire record or administrative file. In such a proceeding the proper standard for a judicial review is whether the Comptroller's adjudication was arbitrary, capricious and an abuse of

discretion or otherwise not in accordance with the law as specified in 5 U.S.C., §706(2)(A).

In *Hughes Air Corp. v. Civil Aeronautics Board,* (9 Cir. 1973) 482 F. 2d 143, the court beginning at the bottom of page 145 said:

> "Admittedly the scope of our review is narrow. See 5 U.S.C. §706. However, we may set aside agency action which is arbitrary or an abuse of discretion if 'this court should be of opinion that (the) action was clearly wrong.' *Bates & Guild Co. v. Payne,* 194 U.S. 106, 109, 24 S.Ct. 595, 597, 48 L.Ed. 894 (1904). We are convinced that these orders were clearly wrong and therefore they are unenforceable."

The plaintiffs have argued on their brief that the defendant is subject to the provisions of the National Environmental Policy Act and cite *First National Bank of Homestead v. Watson,* (D.C. 1973) —— F. 2d ——, where the court held that the Act requires each agency of the Government to consider the effect of its actions as those actions relate to the environment and to set up procedures which will assure a fair and informed preliminary decision in regard thereto. In the instant case there is nothing in the administrative file or record which indicates that the defendant considered the effect of a decision upon the environment. Also, the regulations issued by the defendant do not indicate that he has established any procedure to insure consideration of the environmental factor. However, the failure to conduct an investigation and determine the impact of the establishment of the bank as proposed will have on the environment does not in itself require the court to

set aside the action of the Comptroller. *Hanly v. Kliendienst*, (4 Cir. 1972) 471 F 2d 823.

Upon a considerati[illegible] the entire administrative file, the court is convinced that there is no rational basis in the record for the Comptroller's decision; that there is no genuine issue as to any material fact, and that the action of the defendant Comptroller was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law.

Judgment should be entered granting plaintiffs' motion for summary judgment; overruling defendant's motion for summary judgment; and remanding the application to the Comptroller for further consideration and action in accordance with the law and in the manner as herein stated.

This 1st day of November, 1973.

/s/ Jno. E. Miller
United States Senior District
Judge Sitting by Designation

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 74-1032 & 74-1050

FIRST NATIONAL BANK OF FAYETTEVILLE, FIRST STATE BANK, BANK OF ELKINS, FIRST NATIONAL BANK OF SPRINGDALE, McILROY BANK, BANK OF LINCOLN, FARMERS & MERCHANTS BANK, AMERICAN SAVINGS & LOAN ASSOCIATION, AND FAYETTEVILLE SAVINGS AND LOAN ASSOCIATION ..... *Plaintiffs-Appellees*

v.

JAMES E. SMITH, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES

Defendant-Appellant

NORTHWEST NATIONAL BANK

Intervenor-Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS

December 31, 1974

Before GIBSON, Chief Judge, BRIGHT and WEBSTER, Circuit Judges.

WEBSTER, Circuit Judge.

This appeal presents for our review the summary judgment entered by the District Court remanding to the Comptroller of Currency of the United States a previously approved national bank application submitted by ten individuals seeking to organize the Northwest National

Bank in Fayetteville, Arkansas.[1] *First National Bank of Fayetteville v. Smith*, 365 F. Supp. 898 (W.D. Ark. 1973). The suit for review of the Comptroller's preliminary approval of the application and for injunctive relief had been initiated by seven competing banks and two savings and loan associations,[2] each having its principal place of business in Washington County, Arkansas. The proposed Northwest National Bank intervened in the District Court proceedings and, together with the Comptroller of Currency (the defendant below), prosecutes this appeal. We must decide whether the District Court properly concluded that the Comptroller's grant of preliminary approval was arbitrary, capricious and without rational basis.

The Standard of Review

A preliminary issue for our resolution concerns the proper standard of judicial review in cases such as the one before us.[3] The question arises first in the trial courts and again at the appellate level. The District Court correctly acknowledged that its scope of review was

[1]The jurisdiction of the District Court was founded upon the existence of a federal question and the requisite amount in controversy, 28 U.S.C. § 1331 (a). **See First National Bank of Fayetteville v. Smith**, 365 F. Supp. 898, 901 (W.D. Ark. 1973).

[2]The financial institutions initiating these proceedings were: the First National Bank of Fayetteville, the Bank of Elkins, the First National Bank of Springdale, the McIlroy Bank, the First State Bank, the Bank of Lincoln, the Farmers and Merchants Bank, the American Savings and Loan Association, and the Fayetteville Savings and Loan Association.

[3]It is undisputed that the actions by the Comptroller on matters such as national bank charter applications are subject to judicial review under the Administrative Procedure Act, 5 U.S.C. Sections 701 **et seq. See Camp v. Pitts**, 411 U.S. 138 (1973); **cf. Association of Data Processing Service Organizations, Inc. v. Camp**, 397 U.S. 150, 156-58 (1970).

While we note that the challenged agency action was the

limited, that it could not hold a *de novo* hearing, and finally that it could overturn the Comptroller's decision only if it found that decision to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[4] *See Camp v. Pitts,* 411 U.S. 138 (1973); *Webster Groves Trust Co. v. Saxon,* 370 F. 2d 381 (8th Cir. 1966); *Bank of Commerce of Laredo v. City National*

(Footnote 3 Continued)

preliminary approval granted by the Comptroller, we deem that action final for purposes of judicial review. **Cf. Pineland State Bank v. Proposed First National Bank of Bricktown,** 335 F. Supp. 1376 (D.N.J. 1971). The Comptroller had completed his investigation; an administrative hearing had been held. Further administrative elaboration of the facts was apparently not contemplated. While the grant of preliminary approval contained numerous conditions for the organizers of the proposed bank to fulfill (A. 19 et seq.), these conditions appear to have been imposed not as means of subjecting the preliminary approval to subsequent revision but rather in the exercise of the Comptroller's ongoing supervisory power over the proposed bank. **See** 12 C.F.R. §4.2(c) (1974). The record contains no indication that the conditions render the preliminary approval anything less than final agency action. The Comptroller's action, moreover, had an immediate and substantial impact on the parties involved. **See Aquavella v. Richardson,** 437 F. 2d 397, 403-405 (2nd Cir. 1971).

[4]The Administrative Procedure Act Provides in part that:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be —
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> • • •
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of Prejudicial error.

5 U.S.C. § 706.

Bank of Laredo, 484 F. 2d 284 (5th Cir. 1973), *cert. denied*, 94 S.Ct. 1609 (1974); *cf. Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). The District Court so found and remanded the charter application to the Comptroller for further consideration.

In urging that we uphold that determination, plaintiffs-appellees contend that our appellate review of the District Court's decision is circumscribed by Fed R. Civ. P. 52(a), the "clearly erroneous" standard.[5] In other words, appellees construe the outcome below as the product of factual findings which we may disturb only if "clearly erroneous."

Reliance on Rule 52(a), however, is misplaced. This is a case which the District Court properly decided on cross motions for summary judgment, and thus it saw that there were no genuine issues as to any material fact necessary to resolve. *See* Fed. R. Civ. P. 56. "[W]hen a plaintiff who has no right to a trial *de novo* brings an action to review an administrative record which is before the reviewing court, 'the case is ripe for summary disposition, for whether the order is supported by sufficient evidence, under the applicable statutory standard, or is otherwise legally assailable, involve matters of law.'" *Bank of Commerce of Laredo v. City National Bank of Laredo, supra*, 484 F. 2d at 289, *quoting* 6 J. Moore, Federal Practice ¶56.17[3], at 2472 (1965).

In such cases, the appellate court must render an independent decision on the basis of the same administrative record as that before the district court; the identical

[5]Rule 52(a) provides in part that "(f)indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

standard of review is employed at both levels; and once appealed, the district court decision is accorded no particular deference. *See Polcover v. Secretary of the Treasury*, 477 F. 2d 1223 (D.C. Cir.), *cert. denied*, 414 U.S. 1001 (1973). Thus, we must review the evidence anew and determine whether the administrative action was arbitrary and capricious. "In applying that standard, the focal point * * * should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts, supra*, 411 U.S. at 142. As a result, "the functions of this Court are virtually the same as those already performed by the district court, but, nonetheless are to be performed independently and carefully and without any presumption that the decision of the district court is correct." *Knox v. Finch*, 427 F. 2d 919, 920 (5th Cir. 1970).

Without engaging in any lengthy commentary on the possible inefficiency and delay engendered by this review procedure, *see Polcover v. Secretary of the Treasury, supra*, we accept it as controlling.[6] We proceed, therefore, to an independent examination of the administrative record in order to determine whether the Comptroller acted arbitrarily or capriciously in granting preliminary approval to the charter application of the Northwest National Bank. *See Camp v. Pitts, supra; Bank of Commerce of Laredo v. City National Bank of Laredo, supra.*

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[6] **Worthen Bank & Trust Co. v. Franklin Life Ins. Co.**, 370 F. 2d 97 (8th Cir. 1966), cited by appellees during oral argument before this court, suggests nothing to the contrary, for that case did not involve judicial review of an administrative action.

The Record

As the District Court did, we must consider the administrative record as a whole. *See Camp v. Pitts, supra.* That record was compiled in the following manner: The charter application was filed with the Comptroller on July 8, 1972. [A. 238.] According to the application, Northwest National Bank would provide a full range of banking services from a main office situated on Highway 71 North, Fayetteville, Washington County, Arkansas. [A. 238.] The application proposed that the new bank be authorized to issue 40,000 shares of stock at $25 per share in order to finance an initial capital of one million dollars. [A. 239.] Under the plan submitted to the Comptroller, the individual applicants and prospective officers of the bank would retain 45% of the shares issued while the remainder would be widely distributed to the public. [A. 373.] Extensive supporting documents were filed with the application, including an economic study of the vicinity of the proposed bank and the projected needs of that area,[7] as well as biographical and financial information on the individual applicants. [A. 245 et seq.]

Following the submission of the application, a commissioned National Bank Examiner commenced a field examination on behalf of the Comptroller, pursuant to

[7]The economic study was undertaken by Dr. Gene C. Lynch, who subsequently testified at the administrative hearing.

12 C.F.R. §4.2(b) (1974).[8] [A. 30-47.] Simultaneously, interested regulatory agencies and competing financial institutions were notified of the pending application [A. 235-37]; the nine plaintiffs-appellees filed letters of protest urging that no new bank was needed in the area and requested an opportunity to present their objections at a public administrative hearing [A. 207-32.][9] On November 21, 1972, such a hearing was held before the Comptroller's Regional Administrator in Memphis, Tennessee, which was limited to a presentation of "factual matters concerning the needs and convenience of the

[8]12 C.F.R. §4.2(b) (1974) provides:

> (b) **Investigation.** The Comptroller of the Currency may conduct such investigation as he deems necessary or proper, including the gathering of information as provided in Part 5 of this chapter. Matters investigated include:
>
> (1) The adequacy of the proposed bank's capital structure.
>
> (2) The earning prospects of the proposed bank.
>
> (3) The convenience and needs of the community to be served by the proposed bank.
>
> (4) The character and general standing in the community or (**sic**) the applicants, prospective directors, proposed officers, and other employees, and other persons connected with the application or to be connected with the proposed bank.
>
> (5) The banking ability and experience of proposed officers and other employees.
>
> If the persons referred to in subparagraph (4) of this paragraph are not ready, within 30 days after filing of the application, to submit to and cooperate in the investigation, the Comptroller may treat the application as abandoned.

[9]Neither the applicable statutes nor regulations require that such a hearing be held. See **Camp v. Pitts, 411 U.S.** 138, 139 (1973); **Bank of Commerce of Laredo v. City National Bank of Laredo,** 484 F. 2d 284, 289 (5th Cir. 1973), **cert. denied,** 94 S. Ct. 1609 (1974). However, any "interested party" may request such an opportunity to be heard, or the Comptroller or Regional Administrator may order a public hearing to be held if deemed to be in the public interest. 12 C.F.R. §5.4 (1974).

community for the new National Bank."[10] [A. 501.] At that hearing the applicant bank presented four witnesses in support of its position; the protesting financial institutions called five witnesses in an effort to demonstrate why the charter should not be granted. [A. 499.]

Thereafter, reports and recommendations were submitted to the Comptroller by the National Bank Examiner who had conducted the investigation; the Regional Administrator who had conducted the hearing; the Director of the Bank Organization Division; the Senior Economist of the Department of Economic Banking and Research, and Thomas G. DeShazo, Deputy Comptroller of Currency. With the exception of Mr. DeShazo, who recommended approval of the application, each of these members of the Comptroller's staff recommended disapproval. Without making any findings of his own, the Comptroller adopted Mr. DeShazo's findings and recommendation and granted preliminary approval of the application subject to sixteen specific conditions that the organizers would be required to fulfill before acquiring the charter. [A. 19 et seq.] Plaintiffs then sought an administrative stay of the Comptroller's grant of approval. The Deputy Comptroller thereupon reviewed the record and, in a lengthy memorandum reviewing the facts, recommended that the request for stay be denied [A. 56-62]; the Comptroller concurred and denied an administrative stay.[11]

All of the above described documents together with the transcript of the administrative hearing constitute the record which we must consider.

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[10]The procedure followed at the hearing was governed by 12 C.F.R. §5.4 - .10 (1974). (See A. 501.)

[11]After this suit was filed, the District Court was advised that a Certificate of Authority would not be requested until after a ruling on the merits; accordingly, the District Court did not address itself to the request for preliminary injunction.

Reviewing the Record

The "arbitrary and capricious" standard of review is a narrow one. *Citizens to Preserve Overton Park, Inc. v. Volpe, supra,* 401 U.S. at 416. Its scope is more restrictive than the "substantial evidence" test which is applied when reviewing formal findings made on a hearing record. *See Camp v. Pitts, supra,* 411 U.S. at 141; *Webster Groves Trust Co. v. Saxon, supra,* 370 F. 2d at 387; *Charlton v. United States,* 412 F. 2d 390, 398 (3d Cir. 1969) (Stahl, Circuit Judge, concurring). "Administrative action may be regarded as arbitrary and capricious only where it is not supportable on any rational basis." *Carlisle Paper Box Co. v. N.L.R.B.,* 398 F. 2d 1, 6 (3d Cir. 1968). Something more than mere error is necessary to meet the test. *N.L.R.B. v. Parkhurst Manufacturing Co.,* 317 F. 2d 513, 518 (8th Cir. 1963). To have administrative action set aside as arbitrary and capricious, the party challenging the action must prove that it was "willful and unreasoning action, without consideration and in disregard of the facts or circumstances of the case * * *." 73 C.J.S. *Public Administrative Bodies and Procedure* §209 at 569 (1951).

We conclude that the plaintiffs-appellees failed to meet that burden. While it is true that much of the evidence did not favor the establishment of the proposed bank, the decision of the Comptroller was certainly not without some support in the record: Dr. Gene C. Lynch, Associate Professor of Finance at the University of Arkansas, testified at the administrative hearing that he foresaw significant population growth in the area to be served by the proposed bank, from which he inferred favorable earning prospects; that he believed there to be a need for a new national bank in that area; that he

discerned no undue harm that would result to existing financial institutions and, finally, that he considered the proposed capital structure of one million dollars adequate for a new bank located to serve primarily a residential-suburban market. [A. 511-527.] Dr. John P. Owen, Dean of the College of Business Administration and one of the organizers of the proposed bank, testified that his studies of the University of Arkansas, the largest employer in Washington County, indicated continued growth of that institution;[12] that he saw a "very real need for the new bank;" that its operation would be successful and that it would not result in undue harm to existing financial establishments. [A. 528-532.] Mr. Loris Stanton, a Fayetteville realtor and another of the organizers of the proposed bank, offered testimony that the site selected for the new bank was the best available, in view of the congestion of downtown Fayetteville and the residential and commercial growth patterns of the city. [A. 533-540.] Dr. Donald B. Baker, a physician and one of the organizers of the bank, attested to the rapid growth of the area based on his medical and administrative experience in the area; he cited the expansion of existing hospitals and the need for additional doctors as evidence of this growth. [A. 540-547.]

We note substantial additional evidence supporting the Comptroller's grant of preliminary approval: The study submitted by Dr. Lynch in support of the application explained in detail the economic justification for the establishment of the proposed bank; the study included

[12]In this context, Dr. Owen pointed out that the University's demand deposits are held in the area's two existing banks, on a pro rata basis. In addition, the University's deposit account rotates semi-annually from one bank to another while its invoice account and payroll account are held with each of the two existing banks. (A. 532.)

consideration of the economic characteristics of the area to be served, its past banking history and financial position, as well as detailed projections of earnings, expenses and anticipated deposits for the first three years of operation. [A. 245 et seq.] The National Bank Examiner, the Regional Administrator and the Deputy Comptroller all agreed that the proposed capital of one million dollars was adequate.[13] [A. 27, 40, 48.] The memoranda submitted by Deputy Comptroller DeShazo contained a detailed account of the projected service area's need for the new bank and the "strategic location" of the proposed site. [A. 26-28; 56-62.]

Finally, with respect to the character, reputation and banking ability of the individual applicants and the proposed directors, officers and employees, the record discloses both favorable and unfavorable evidence. Viewed in balance, however, the favorable evidence was by no means insubstantial and was in any event sufficient to lend support to the Comptroller's decision to grant preliminary approval. No real purpose would be served by detailing here the favorable and unfavorable comments which appeared in the administrative file with respect to the organizers. Character, general standing in the community and banking experience are all matters to be weighed with other factors. 12 C.F.R. §4.2(b) (1974), quoted at note 8 *supra*. The District Judge concluded that the Deputy Comptroller and the Comptroller had ignored the findings of the Examiner and the Regional Administrator. We do not draw the same inference. The investigative reports reflect a board composed of men of wide-

[13]The Comptroller's original grant of preliminary approval was subsequently modified to require that the initial capital contribution be increased from one million dollars to one million five hundred dollars. (A. 52-53.)

ranging business and banking experience who possessed substantial personal financial strength for the area in which the proposed bank would serve. Innuendos about self-serving propensities, speculative business practices and suspicions of shady practices were presented to the Comptroller, and we cannot say that his rejection of these rumors in favor of the hard record of a reasonably experienced and balanced board of citizens with deep roots in the community was either arbitrary or capricious. No doubt the experienced District Judge who first reviewed this record was as competent as the Comptroller, if not more so, to size up the qualifications of the organizers, and in a case tried to him upon a fresh record we would not hestitate to defer to his considerable experience and wisdom. But the statutory frame work is not thus constructed, and we cannot say that the Comptroller's conclusions are made arbitrary or capricious by reason of his analysis of the character, standing and experience of the organizers as reflected in this record.

It is well established that in rendering a decision on the basis of such an administrative record the reviewing "court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc. v. Volpe, supra,* 401 U.S. at 416.[14] *See also Webster Groves Trust v. Saxon, supra; Sterling National Bank of*

[14]This rule has evolved in recognition of the administrator's expertise in dealing with certain kinds of problems and in deference to the broad discretion conferred on him by statute and regulation. See 12 U.S.C. Sections 26-27; 12 C.F.R. §4.2 (1974). **See also Webster Groves Trust Co. v. Saxon,** 370 F. 2d 381 (8th Cir. 1966); **Bank of Commerce of Laredo v. City National Bank of Laredo,** 484 F. 2d 284 (5th Cir. 1973), **cert. denied,** 94 S. Ct. 1609 (1974); **First National Bank of Fairbanks v. Camp,** 465 F. 2d 586 (D.C. Cir. 1972), **cert. denied,** 409 U.S. 1124 (1973); **Sterling National Bank of Davie v. Camp,** 431 F. 2d 514 (5th Cir. 1970), **cert. denied,** 401 U.S. 925 (1971); **First Citizens Bank and Trust Co. v. Camp,** 281 F. Supp. 786 (E.D. N.C. 1968), **aff'd,** 409 F. 2d 1086 (4th Cir. 1969).

Davie v. Camp, 431 F. 2d 514 (5th Cir. 1970), *cert. denied*, 401 U.S. 925 (1971). It is in this respect that the District Judge erred, for rather than resolving the evidentiary conflicts in favor of the Comptroller's action, he independently weighed the evidence and reached his own conclusions. *Cf. Unimed, Inc. v. Richardson*, 458 F. 2d 787, 789 (D.C. Cir. 1972); *Jaeger v. Stephens*, 346 F. Supp. 1217, 1225 (D. Colo. 1971); *First Citizens Bank and Trust Co. v. Camp*, 281 F. Supp. 786, 791-92 (E.D.N.C. 1968), *aff'd*, 409 F. 2d 1086 (4th Cir. 1969). Thus, in reviewing the earning prospects of the bank, the District Judge improperly decided to give greater weight to the testimony offered at the hearing by Dr. Kane, the protestants' expert witness and a director of one of the competing banks, than to that offered by Dr. Lynch, applicants' expert.[15] Likewise, the District Judge erroneously rejected the new bank's proposed capital as inadequate despite the approval of that amount by the National Bank Examiner, the Regional Administrator and the Deputy Comptroller.[16] And, by focusing almost exclusively on evidence that the geographic area needed larger banks rather than an additional

[15]In this regard, the District Judge stated:

> The testimony of these two witnesses with their exhibits is voluminous. Their opinions are based upon their individual conclusions of the mass statistics. The court is of the opinion that Dr. Kane's testimony is hinged more closely to the actual facts and conditions that exist in the area than the testimony of Dr. Lynch.

365 F. Supp. at 906.

[16]The District Judge compared the proposed capital structure of the new bank to that of competing banks and savings and loan associations in the area and concluded that the one-million-dollar amount was too small. 365 F. Supp. at 905. In addition, he hypothesized that the lending institution financing a portion of the cost of the new bank's stock might acquire control of the new bank, a result which in turn might violate a new Arkansas statute restricting branch banking, Ark. Stat. Ann. §67-360 (Supp. 1973). 365 F. Supp. at 905.

bank, the court below concluded that the memoranda and recommendation of approval by the Deputy Comptroller were arbitrary and capricious — a conclusion we are compelled to reject in view of the ample evidence, recited above, that the needs and convenience of the community would in fact be served by the establishment of the new bank.

In rejecting such favorable evidence, the District Judge emphasized that the Comptroller had made no findings of his own but instead had apparently adopted the view of Deputy Comptroller DeShazo, the only member of the staff recommending approval of the charter application. 365 F. Supp. at 904. It is undisputed that neither the National Bank Act nor the Administrative Procedure Act requires the Comptroller to make formal findings on a hearing record. *Camp v. Pitts, supra*; *Webster Groves Trust Co. v. Saxon, supra*; *Sterling National Bank of Davie v. Camp, supra.* This is so because the function of the hearing panel in such cases is that of a "fact-gathering organ" rather than a fact-finder. *First National Bank of Fairbanks v. Camp,* 465 F. 2d 586, 604 (D.C. Cir. 1972), *cert. denied,* 409 U.S. 1124 (1973); *First-Citizens Bank and Trust Co. v. Camp,* 409 F. 2d 1086, 1090 (4th Cir. 1969). Moreover, it was not for the District Court to reassess the relative merits of the conflicting recommendations submitted by the Comptroller's staff, for it lies within the Comptroller's broad discretion to accept or reject the views of his subordinates as he sees fit. *First National Bank of Southaven v. Camp,* 333 F. Supp. 682, 686 (N.D. Miss. 1971), *aff'd mem.,* 467 F. 2d 944 (5th Cir. 1972); *see Sterling National Bank of Davie v. Camp, supra.*

Our consideration of this matter convinces us that the District Court, while articulating the correct standards

of review, did in fact exceed those narrow limits and erroneously decided that the Comptroller had acted arbitrarily and capriciously. The decision of the District Court is therefore reversed and remanded to the District Court with instructions to enter judgment in favor of appellants.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

12 U.S.C. §26; Vol. 3, U.S.C., p. 2263 (1970 Ed.):

Whenever a certificate is transmitted to the Comptroller of the Currency, as provided in this chapter, and the association transmitting the same notified the comptroller that all of its capital stock has been duly paid in, and that such association has complied with all the provisions of this chapter required to be complied with before an association shall be authorized to commence the business of banking, the comptroller shall examine into the condition of such association, ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each of its directors, and the amount of the capital stock of which each is the owner in good faith, and generally whether such association has complied with all the provisions of this chapter required to entitle it to engage in the business of banking; and shall cause to be made and attested by the oaths of a majority of the directors, and by the president or cashier of the association, a statement of all the facts necessary to enable the comptroller to determine whether the

association is lawfully entitled to commence the business of banking.

12 C.F.R. §4(b), p. 129 (1973 Ed.):

(b) *Investigation.* The Comptroller of the Currency may conduct such investigation as he deems necessary or proper, including the gathering of information as provided in Part 5 of this chapter. Matters investigated include:

(1) The adequacy of the proposed bank's capital structure.

(2) The earning prospects of the proposed bank.

(3) The convenience and needs of the community to be served by the proposed bank.

(4) The character and general standing in the community or (*sic*) the applicants, prospective directors, proposed officers, and other employees, and other persons connected with the application or to be connected with the proposed bank.

(5) The banking ability and experience of proposed officers and other employees.

If the persons referred to in subparagraph (4) of this paragraph are not ready, within 30 days after filing of the application, to submit to and cooperate in the investigation, the Comptroller may treat the application as abandoned.

COMPTROLLER'S DECISION

Approved: /s/ Thomas B. Camp Date: 2/5/73

January 26, 1973

MEMORANDUM FOR THE FILES:

Re: New Bank Application
Fayetteville, Arkansas
Mr. Charles T. Pearson, Jr., Agent

Distribution of Stock Ownership

The organizers and proposed directors indicated they would hold 50% of the stock in the new bank; however, the record indicates that all of the individuals plan to borrow 100% of the cost of the stock. It is appropriate to limit the borrowings of this stock acquisition and it is recommended that a limitation be placed providing that no individuals may borrow in excess of 50% of the cost of the stock.

Management

The directorate as proposed appears to be representative of the business and professional ranks of the community and it is believed they are qualified from a review of the record to provide proper guidance for this new bank.

It should be noted that the Examiner does not recommend certain of the organizers as directors; however, this

recommendation is not supported by the record and is a personal judgment without basis in the record.

The proposed President, Mr. John E. Cook, appears to be qualified from a review of the record; however, it should be noted that the Regional Administrator states, "The proposed president appears to have sufficient experience in banking, but not in the areas or functions in which the bank will engage".

On balance, the record does not support the adverse recommendation of the Examiner and Regional Administrator and it is recommended that Mr. Cook be approved as President.

Capital

The proposed capital of $1,000,000 is considered adequate.

Fixed Assets

The application as presented provided that the new bank building will be owned by all of the organizers and leased to the bank. This is not appropriate and it is recommended that a requirement be made that the bank must own its fixed assets and the total investment in such fixed assets should not exceed $400,000.

Convenience and Need and Competitive Factors

This new bank would be located approximately 3.9 miles from the downtown business district of Fayetteville.

The market area is served by 2 branches of 2 well established banks with deposits of $54 Million and $32 Million respectively.

The Field Investigation report reflects the following comments by the Examiner, "there is a need for stronger commercial banks in the northwest corner of Arkansas and the evidence supplied adequately supports the fact that Fayetteville and Washington County are experiencing impressive growth." The Regional Administrator also stated in the Field Investigation report the site chosen is within an area of Fayetteville which has experienced good growth and future prospects of continued expansion appears good.

The proposed new bank would not create an excess of banking facilities and it appears the establishment of this proposed new bank would serve the convenience and needs of the community and have no serious effect on the existing institutions.

Protests

Protests were received and a Hearing was conducted in our Regional Office to afford all parties an opportunity to comment.

Conclusion

It should be noted that the Bank of Elkins, Elkins, Arkansas, previously had filed an application with the State to relocate to Fayetteville. This relocation application was disapproved in November, 1972. Subsequently, the Bank of Elkins met with the Regional Administrator

and discussed converting the Bank of Elkins to a National Bank and filing an application to relocate the Bank of Elkins to Fayetteville.

When consideration is given to the record as developed, it is concluded that there is a reasonable base to support this new bank and it is recommended that the application be approved with the title, "Northwest National Bank".

/s/ TGD
Thomas G. DeShazo
Deputy Comptroller of the Currency

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Rev. ed March 1971
UNITED STATES TREASURY
COMPTROLLER OF THE CURRENCY

RECOMMENDATIONS

REASONS:

Fayetteville, Arkansas
Bank Location

1-12-73

Approved

Conclusion

T. H. BRENNEN

Director, Bank
Organization Division

Adequate-Inadequate

Title
Cap. Struc.
Earnings
Management
Conv. and Need

REASONS:

Organizers do not appear to have access to the degree of managerial talent needed to take advantage of this limited banking opportunity. Approval of this application will not tend to satisfy the convenience and needs of the community.

UNFAVORABLE - 1-16-73

Conclusion

David C. Hayes
Senior Economist

Dept. of Econ. Banking & Research

Title
Cap. Struc.
Earnings
Management
Conv. and Need

REASONS:

PLEASE NAME MEMO

[illegible]

Conclusion

Deputy Comptroller of the Currency

Title
Cap. Struc.
Earnings
Management
Conv. and Need

Form CC-1555-OX Page 1
Revised March 1971
UNITED STATES TREASURY
COMPTROLLER OF THE CURRENCY

National Bank Region No. 8

SUPPLEMENTAL INFORMATION
DEVELOPED IN RELATION TO AN
APPLICATION FILED TO ORGANIZE
A NEW NATIONAL BANK

Northwest National Bank, Fayetteville, Washington Arkansas
(Proposed bank title) (City, Town, or Village) (County) (State)

Other acceptable titles:

(a) Northwest National Bank of Fayetteville (b) National Bank of Northwest Arkansas

Date Briefed January 10, 1973

RECOMMENDATIONS

(Favorable or unfavorable)	Condensed Comments
	Capital suffient. Directors and Management unsatisfactory. No need and bank would not be convenient.
	RECOMMENDS DISAPPROVAL
Harry D. Denton National Bank Examiner	
✓	Capital adequate. Management inadequate. No need and not convenient.
	RECOMMENDS DISAPPROVAL
J. W. Shaffer Regional Comptroller of the Currency	
	No comments.
H. C. Adams	

Procedures Followed By the Office of the Comptroller of the Currency in the Investigation and Screening of All Applications to Organize a National Bank

No action, whatsoever, is initiated or taken on proposals to organize a new National Bank until an original and one copy of the "Application to Organize a National Bank" is received in this Office or in the office of the appropriate Regional Chief National Bank Examiner in acceptable form and over the signatures of at least five prospective shareholders, preferably officers or directors of the proposed institution. This form is available upon request and without charge from any of the fourteen Regional Offices or the Office of the Comptroller in Washington, D. C. When a request for application forms is received, three copies of the form are dispatched promptly and are accompanied by other enclosures. These enclosures, which are a "Summary of Information. . . .", Personnel Information sheet and Personal Financial Statement accompany the form letter to indicate to the organizers the scope of the investigation which will be made upon receipt of their application. The content and significance of this background information will be discussed later in this memorandum but perusal of its contents testifies to its comprehensiveness. The form letter counsels the applicants to discuss their proposal with the Chief National Bank Examiner for their Region, who is well qualified to make suggestions which will result in expediting the investigation and processing the application in a businesslike manner on a basis of fact. This same letter also cautions the applicants with respect to our high standards for capitalization, points out Office policy prohibiting the payment of any fees or commissions for procuring subscriptions to or the sale of stock in the proposed bank

and prohibiting excessive fees for the performance of legal services or the development of supporting economic surveys. It further notifies the applicants that unless they are ready for complete and exhaustive field investigation within 60 days of the date of filing, we shall consider the application abandoned. We have found this requirement to be an effective instrument in screening applications which have not been well considered in advance and are unsubstantial in nature.

Upon receipt of an application in acceptable form to organize a National Bank, each Regional Chief National Bank Examiner is under standing instructions to schedule an on-the-spot investigation at the earliest practicable date and consistent within our "ready" requirement of 60 days. He immediately orders Dun and Bradstreet reports on the organizers which are used as a supplement to the personnel information developed by the investigating examiner. When the Regional Chief National Bank Examiner has been notified that the applicants are ready for the investigation of their proposal, a *commissioned* National Bank Examiner who is a thoroughly competent career professional and who commands the confidence of his superiors is assigned to the case and it is his responsibility to prepare a report of investigation.

The preparation of this investigation report is based upon a thorough analysis of the many factors on which a decision of approval or rejection is based and in *every* instance is the product of an impartial, on-the-scene investigation which normally consumes from two to five full days of the investigating examiner's time. This does not include the time necessary to fill out the report which usually consumes an additional two days. Personal interviews and random sampling of public opinion are employ-

ed in conjunction with other techniques to test the views, financial statements, and all other data submitted by the proponents in support of the application. Automobile, appliance and equipment dealers are queried on the support they receive from existing banks in financing their inventory and sales. Businessmen are also asked the volume of checks which they clear on out-of-town banks. Existing banks which would be competitive with the proposed institution are given an opportunity to present their views in person and/or in writing if they so desire. Professional and businessmen, along with the public in general, are interviewed to determine probable support for the proposed bank, the community standing and reputation of the individual applicants and the adequacy of existing bank facilities and services. Each organizer, prospective director and proposed officer is interviewed individually at which time details of his financial statement, other personal affairs and the Dun and Bradstreet reports can be substantiated and clarified.

Concurrent with these interviews and sampling of business, professional, competitor and public opinion, the investigating examiner has an opportunity to observe the proposed location of the bank, its accessibility to the public, economic growth, traffic flow, and attractiveness of the surrounding area and location with respect to existing banks. At the conclusion of the investigation the examiner is in a position to draw rather accurate conclusions regarding the potential of management, earnings and deposit forecasts, public need, capital adequacy, location and the *general competitive climate* in which the new bank would exist.

The last consideration, i.e., the general competitive climate in which the new bank would exist, deserves elabo-

ration since the analysis of this factor is all important to our objective of fostering a viable and wholesome competitive banking industry which is responsive to the needs of the public and the communities they serve. Basic to this analysis is a study of the policies and practices of existing banks. The questions below reveal the nature of the inquiry.

1. Since an efficient check collection system is in the public interest, do any of the banks in the proposed trade area practice non-par banking?
2. Do the relationships of loans to deposits suggest that existing banks may not have participated fully in supporting the economic growth of their community or trade area?
3. What is the make-up of the competing banks' loan portfolios? Have they relied heavily upon credit that is supported by governmental guaranties or insurance and which often is indicative of an unwillingness to assume leadership in meeting public and community need?
4. Do existing banks provide a full complement of service and convenient facilities?
5. Were these services and facilities provided only recently in response to this or other charter applications?
6. Do competing banks have active and vigorous management, with depth in evidence and supported by training programs and modern employee benefits?
7. Do existing banks have a growth history as evidence of their recognition and response to the challenge of serving the public and the community?

To this point we have dealt with the procedures for filing an application to organize a National Bank, the preliminary instructions and preparations which are necessary to permit a thorough investigation and the methods pursued by the examiner in accumulating and verifying data in support of or in opposition to the proposal. It is now necessary for the investigating examiner to prepare his report. An analysis of this document, which follows, will reveal the thoroughgoing nature of our inquiry to establish a basis of information and analysis upon which a knowledgeable decision for approval or rejection of the application can be made.

Pages 1, 2, and 3 [of the Examiner's Report of ~~Investi-~~ gation] merely summarize information contained elsewhere in the report and need not be commented upon further. The first important essential dealt with in the report, i.e., the character, financial standing and experience of the organizers, and the banking experience, ability and capacity of the proposed executive officers, is treated on pages 4, 4a, 4b, etc. Based upon information developed during the investigation, the examiner must cover the following points on these pages.

A. Age.

B. Residence address.

C. Occupation and occupational background.

D. Approximate net worth and the amount of his present debts.

E. General standing in the community.

F. Past and present bank affiliations as an officer or director, keeping in mind the Clayton Act; favorable or unfavorable record of such affiliations.

G. Favorable or unfavorable current and past borrowing record with other banks.

H. General character of personality, i.e., forceful, sincere, intelligent, or otherwise.

I. The amount of capital stock in the new bank which he proposes to purchase.

J. Whether it would appear that his desire to organize a new bank is primarily for personal reasons (borrowing opportunities, unjustified personal animosity toward existing banks, prestige, or immoderate personal gain), rather than as a sound investment opportunity which will result in fulfilling a community need.

K. Proposed salary to be paid any organizer who expects to become an executive officer of the new bank.

L. Source of funds for purchase of capital stock. If borrowings are utilized, furnish name of lender, collateral to be pledged, if any, and terms of the loan.

If the organizers or the proposed active executive management shape up unfavorably as to (1) sincerity of purpose, (2) ability and experience, (3) financial capacity, or (4) character and general standing in the community, the examiner must determine whether it is sufficiently unfavorable to warrant or demand his adverse recommendation on the application, regardless of the nature of his findings on the remaining phases of the investigation.

Continuing on in the report of investigation, the examiner is required to comment on the banking requirements

of the community in relation to its needs and existing bank services and facilities. The following points are covered in the report.

A. Population of the city, town, or village; its growth during past ten years and estimated future growth.

B. Employment characteristics of population.

C. Population and employment characteristics of trade area served by the community.

D. Economic background of the community and its trade area.

1. The principal industries and businesses and the approximate number of people therein employed.

2. The relative stability and trend of these industries and businesses during the past ten years noting any currently favorably or unfavorable factors which may affect their future prospects.

3. The approximate dollar value of business done by the important industries and businesses during the preceding year.

E. Financial position of the city, town, or village, and, if pertinent, the county wherein located. Are municipal finances considered to be on a sound basis? If serious municipal financing problems exist in the form of a large indebtedness, tax collection difficulties, highly burdensome real estate assessments and taxes, the matter should receive appropriate comment as constituting an adverse factor in the economic background of the community.

F. Existing banking facilities. Names and locations of all banks operating in the community are provided. If any or all such banks are State chartered institutions, the examiner will include copies of their most recent published statements of condition and comment on the reported nature of their management and loaning policies, and whether or not they are regarded as sound, profitable, competitive, well managed institutions responsive to the needs of the public and the community.

G. Past banking history of the community. Here the examiner gives a brief history of banking operations during the past twenty-five years, noting any bank failures, mergers, or consolidations which transpired.

H. If there are no existing banks, it will be determined where the banking business of the community is transacted. The names and locations of the banks involved and the distances between towns are noted.

The examiner must determine, on the basis of factual information developed in relation to the various points set forth above, whether

(1) Existing banking facilities are fully adequate in services offered as well as numbers to the point where an additional banking facility would be uneconomic, superfluous, and unjustified, or

(2) Existing banking facilities are fairly adequate only, or inadequate in service as well as numbers, to the point where an additional banking

facility is justified as a community convenience and need, and by the potential business it will receive, thereby providing reasonably good prospects for its future successful operations and earnings.

Following the economic and banking history of the community, the examiner is required to comment directly on the strength of management based upon the background information and criteria discussed above. He also must analyze the capital structure of the proposed bank. In this connection it must be determined whether the proposed capital

(1) Conforms to the requirements of law,

(2) Is adequate to accommodate the anticipated volume of business and total resources, and

(3) Will place the bank in a position to compete against existing banks on a relatively equal and fair basis for local banking business. It must be determined to what extent the new capital is to be invested in a banking house and furniture and fixtures, and the exact location of the banking house site. It is an adverse factor if a large percentage or a majority of the new capital is to be frozen immediately in fixed assets.

On pages 7 and 8 of the investigation report the examiner provides data concerning the public need for a new bank, the adequacy of existing services and facilities and his opinion regarding the success of the venture based upon estimated deposits, earnings and expenses. He also must consider whether an overbanked situation would be created by the application, whether a healthy or unhealthy degree of

competition would accrue and set down his opinion concerning these matters.

The proposed ownership of the bank is also given consideration. Generally speaking, a wide distribution of stock is encouraged since it will insure maximum support for the proposed bank and gives evidence of sincerity of purpose, i.e., fulfillment of a public need.

Page nine of the investigation report directs the examiner's attention to pending or conflicting applications both National and State and also to the views of opponents of the application. When opposition has been expressed verbally, the examiner summarizes these remarks in the report. When opposition has been expressed in writing, these remarks are incorporated in full in the report.

The proposed banking house and furniture and fixtures are also given consideration and question 17, page 10 outlines the approach to this important aspect.

At the conclusion of the report of investigation, the examiner summarizes the favorable and unfavorable factors surrounding the application as does the appropriate Regional Chief National Bank Examiner. The report is then forwarded to the Office of the Comptroller of the Currency and is accompanied in all cases by a map indicating the location of existing banks and branches, major thoroughfares, retail trade districts, etc. In most cases, the report is also supplemented by economic surveys, aerial photos and market samplings. When the report has been received in this Office, it is analyzed by the staff and forwarded to the Comptroller. Before a final decision is rendered, all views in opposition are carefully weighed and reviewed and if the opponents desire to present their case in person arrangements are made for such a meeting without exception. When

the case appears highly controversial or the data supplied by the proponents and opponents is in substantial and direct conflict, the Comptroller may and has scheduled an open hearing before a final decision is made.

We believe that the procedures outlined in this Memorandum and pertinent forms represent a thorough and sincere attempt to collect, verify and analyze the information necessary for the competent discharge of the responsibilities of the Comptroller of the Currency relating to controlled entry into the National Banking System. — *Federal Banking Law Service,* Bank Regulation Index, ¶386.1A, p. 244.39 (A. S. Pratt & Sons, 1970 Ed.)

(*b*) *Employment History*

Mr. Baker is a medical doctor and surgeon and is reported to have the largest general practice in Fayetteville, Arkansas.

(c) *Character and Reputation*

The subject is reported to be well regarded in the community, both personally and professionally. He is active in groups of his profession and reportedly holds and has held many responsible positions within these groups.

(*d*) *Banking Experience*

No previous banking experience.

(*e*) *Conclusions and Recommendations*

Subject would be a strong director for the proposed bank.

(b) *Employment History*

The subject has been gainfully employed in the banking profession for at least the past eleven years.

(c) *Character and Reputation*

All information developed reflects the subject is entirely trustworthy and reliable.

(d) *Banking Experience*

Mr. Cook appears to have gained a good knowledge of installment lending from his experience at The Commercial National Bank of Little Rock, Little Rock, Arkansas, from 1961 until 1966. He was a branch manager of the Monrovia, Liberia Branch of The International Trust Company of Liberia, West Africa, from 1966 until 1971. This experience appeared to be a general banking relationship. Subject is presently employed as manager of the international department of Union National Bank of Little Rock. This department was just recently established. Subject's banking philosophy appears sound, but he also appears somewhat out of touch with current developments and ideas. His major emphasis has, of course, been directed to international banking in recent years.

(e) *Conclusions and Recommendations*

The subject is not considered to possess sufficient leadership capacity to manage a national bank. He lacks aggressiveness and appears to have weaknesses relative to public relations and marketing. His individual shortcomings would not be considered severe, but combined with the lack of experience and leadership of the group, these defects would warrant an adverse recommendation.

(b) *Employment History*

Subject has been involved in the retail furniture sales business and real estate transactions most of his life. He started in the furniture business in Harrison, Arkansas.

(c) *Character and Reputation*

Mr. Eoff's general reputation in the Fayetteville area is less than attractive. He is considered a "plunger" in business affairs and his character was questioned on several occasions by management of the local financial institutions. Mr. Eoff referred to "beating Uncle Sam" on at least two occasions during a discussion about his business affairs. Subject is quite talkative and uses little discretion.

(d) *Banking Experience*

No previous banking experience.

(e) *Conclusions and Recommendations*

Subject's reasons for affiliation with the proposed bank is questioned as well as his general reputation and character. Mr. Eoff is not recommended.

(b) *Employment History*

Subject has been a dairy farmer most of his life and was instrumental in organizing the Associated Milk Producers, Inc., a milk marketing association. He served as secretary/director until just recently when a power struggle resulted in his replacement.

(c) *Character and Reputation*

Mr. Morris, until recently, was an officer of Associated Milk Producers, Inc., a milk marketing association which has pending legal action by the Justice Department of the

United States government for possible violations of Sections I and II of the Sherman Anti-Trust Act and the Capper Volstead Act. This organization was also recently criticized for a $300,000 contribution to a national political party, shortly after a favorable Administrative action.

(*d*) *Banking Experience*

Subject has served as a director of the First National Bank, Siloam Springs, Arkansas, since January, 1969.

(*e*) *Conclusions and Recommendations*

Mr. Morris' connection with the Associated Milk Producers, Inc. is the only possible matter that could affect his association with the proposed bank. It is apparently not common knowledge locally as no mention from the opposition was made on this matter. Subject's leadership and organizing ability would be of great help to the proposed bank.

(*b*) *Employment History*

Mrs. Morris has been involved in the automobile business all her life, while working with and for her father until his recent death. Management at the McIlroy Bank stated that several years ago past-due paper purchased from Reliable Finance Company was excessive, but was now under control due to the efforts of subject.

(*c*) *Character and Reputation*

Subject's general reputation is sound. It was noted that most of the representatives of the opposition stated that Mrs. Morris was the strongest member in the group.

(*d*) *Banking Experience*

Subject has no previous banking experience. She does service the discounted loans sold to the McIlroy Bank by her automobile company.

(*e*) *Conclusions and Recommendations*

Subject's association with the proposed bank would be quite helpful. It is expected that Mrs. Morris just might be the chairman of the board.

(*b*) *Employment History*

Subject is Dean of the College of Business Administration and professor of economics at the University of Arkansas. Dean Owen has been a teacher most of his career with little actual business experience behind him.

(*c*) *Character and Reputation*

Subject did not appear to have the general level of enthusiasm that most of the other organizers demonstrated. He did state that he would leave the University of Arkansas if he were independently wealthy. He expressed some dissatisfaction with the present school administration.

(*d*) *Banking Experience*

No previous banking experience, although it is reported that Dr. Owen has compiled numerous economic reports relative to bank charters. It is also reported that Dr. Owen has for many years been on the faculty of the Banking School of the South, Louisiana State University, Baton Rouge, Louisiana.

(*e*) *Conclusions and Recommendations*

Subject's association would be beneficial to the propos-

ed bank. It is anticipated that Dr. Owen will have considerable influence with university funds and personnel. It is not expected that this influence will be mis-used.

(b) *Employment History*

Subject was a lawyer with the U. S. Navy for 16 years prior to returning to Fayetteville to practice law. He appears to be more successful at his real estate business than at law. Apparently Mr. Pearson has few prominent clients.

(c) *Character and Reputation*

Subject appears to be aggressive in real estate development and some members of the community questioned his character and reputation. Cases of public drunkenness were mentioned in the investigation.

(d) *Banking Experience*

No previous banking experience.

(e) *Conclusions and Recommendations*

Subject's involvement in business promotion and general reputation would leave a question as to his capacity to properly direct a national bank. Subject is not recommended.

(b) *Employment History*

Subject is the County Agricultural Agent and is considered to have influence with the local farm community. No other experience.

(c) *Character and Reputation*

All information developed reported the subject as being entirely trustworthy and reliable.

(d) *Banking Experience*

No previous banking experience.

(e) *Conclusions and Recommendations*

Mr. Rose's influence with the local rural community would be valuable, but his lack of financial capacity in personal business affairs would be a major disadvantage in directing a national bank. He is outspoken and generally uninformed on current economic conditions. His qualifications are considered limited and subject is therefore not recommended.

(b) *Employment History*

Subject has been a manager of a general store, a steel jobber, school teacher and mortician. It appears that she is unable to properly supervise the operation of her general store.

(c) *Character and Reputation*

Nothing derogatory.

(d) *Banking Experience*

No previous banking experience.

(e) *Conclusions and Recommendations*

Subject is not proposed as a director.

(b) *Employment History*

Prior to entering the real estate sales business in Fayetteville, Arkansas, subject was a manager for Malco Theaters, Inc., Memphis, Tennessee. No other employment experience known.

(c) *Character and Reputation*

Subject's general reputation in the area is considered one of a "plunger". It must be noted, however, that his success has been good in most of his real estate speculation. Mr. Stanton was reportedly denied membership in a local real estate sales association several years ago because of "unethical" selling practices. No additional information available.

(d) *Banking Experience*

No previous banking experience.

(e) *Conclusions and Recommendations*

Subject appears to be successful in real estate sales and development but lacks banking experience. He is quite aggressive, but leaves one with questions as to his absolute integrity although the investigation revealed no information to substantiate this conclusion. The public response toward Mr. Stanton's association was one of caution and uncertainty. He is apparently a "self-made man" with this success a result of his ability in real estate sales. He is not considered prudent in business relations, his stability is questioned, and his capacity for "self dealing" is challenged. Mr. Stanton is not recommended.